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ANNUAL REPORT

Environmental Review Tribunal

April 1, 2008 to March 31, 2009

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Message from the Chair

It is my pleasure to report on the activities of the Tribunal for the fiscal year 2008-2009.

Presently, the Tribunal adjudicates appeals, applications and referrals under 12 statutes. The Tribunal has recently been named the appellate body for the proposed *Green Energy and Green Economy Act, 2009* and the proposed *Toxics Reduction Act, 2009.* These additional responsibilities will result in an increased workload for the Tribunal Members and Staff.

In July 2008, the Tribunal improved access to its users through its website to submit appeals and applications electronically. Hearing locations are now posted on the website. The Tribunal also upgraded its search engine to provide users with more specific results to their queries.

The Tribunal drafted specific Conflict of Interest Rules under the *Public Service of Ontario Act, 2006* and revised its Complaints Policy. On August 20, 2008, these documents were posted on the Tribunal's website.

On January 22, 2009, the Tribunal, formerly an agency of the Ministry of the Environment, became an agency of the Ministry of the Attorney General. The Tribunal is now part of the Environment and Land Use Cluster, sharing space and administrative functions with the Assessment Review Board, the Board of Negotiation, the Conservation Review Board, and the Ontario Municipal Board.

I am very pleased to report that, during this last fiscal year, the Tribunal increased the number of cases settled as a result of our mediation services. We have also exceeded our performance targets for the timely release of Members' decisions and the scheduling of hearings.

During this past fiscal year, the term expired for Knox Henry, a long standing full-time Vice Chair. I want to thank him for his many years of service to the Tribunal.

I would like to thank all of the Tribunal Members and Staff for their continuous efforts to meet our performance targets and their commitment to fulfill our mandate.

Toby Vigod

Chair

June, 2009

The Tribunal's Mandate

The Environmental Review Tribunal (Tribunal) was established under the *Environmental Review Tribunal Act, 2000.*

The Tribunal is a quasi-judicial administrative tribunal, subject to procedural fairness, the rules of natural justice, and the requirements of its governing legislation and the *Statutory Powers Procedure Act*. The Tribunal adjudicates applications and appeals under the following statutes: *Clean Water Act, 2006*, *Consolidated Hearings Act, Environmental Assessment Act*, *Environmental Bill of Rights, 1993, Environmental Protection Act*, *Niagara Escarpment Planning and Development Act, Nutrient Management Act, 2002, Ontario Water Resources Act*, *Pesticides Act*, and *Safe Drinking Water Act, 2002.* The Tribunal also hears matters under the *Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005*. See Appendix A for an overview of the legislation governing the work of the Tribunal.

Under the *Niagara Escarpment Planning and Development Act*, Members of the Tribunal are appointed by the Minister of Natural Resources as Hearing Officers to conduct hearings. The Hearing Officers make recommendations concerning appeals of decisions of the Niagara Escarpment Commission regarding development permit applications. Members are also appointed to conduct public hearings for the purpose of making recommendations regarding proposed Niagara Escarpment Plan (NEP) amendments. Every 10 years, Members conduct hearings to review the NEP.

Under the designation of the Office of Consolidated Hearings, the Tribunal administers hearings as requested under the *Consolidated Hearings Act*. Under the authority of the *Consolidated Hearings Act,* a Joint Board is established in order to eliminate a multiplicity of hearings before different tribunals under various acts on matters relating to the same undertaking. A Joint Board usually consists of Members of the Tribunal and the Ontario Municipal Board and is empowered to hold a hearing to consider all of the matters under all of the acts that govern the undertaking and for which hearings are required.

The Tribunal Members, who are Order-in-Council appointees, conduct fair, efficient and impartial hearings and make decisions (or recommendations) with written reasons that are based on the evidence presented, in a manner that protects the environment and is consistent with the Tribunal's governing legislation. A profile of the Tribunal Members is found at Appendix B.

Core Functions of the Tribunal

The Environmental Review Tribunal has four main functions, which are:

1. **Conducting Pre-Hearings, Hearings and Decision Making**
2. **Processing of Hearings**
3. **Conducting Mediation**
4. **Providing Public Access**

1. CONDUCTING PRE-HEARINGS, HEARINGS AND DECISION MAKING

The Tribunal Members, who are all Order-in-Council appointees, are responsible for these functions, which include the conduct of hearings and the issuance of written decisions.

All reports arising from appeals of development permit applications under the *Niagara Escarpment Planning and Development Act* (*NEPDA*) are required by legislation to be issued within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Recommendations for Niagara Escarpment Plan amendment applications must be rendered no more than 60 days after the conclusion of the hearing or within such extended time as specified by the Niagara Escarpment Commission. Tribunal decisions on Leave to Appeal applications under the *Environmental Bill of Rights, 1993* are to be issued within 30 days of the filing date of the application, unless the Tribunal determines that, due to unusual circumstances, a longer period is required. In all other types of decisions, Tribunal Members endeavour to render their decisions within 60 days of the completion of the hearing or the filing of final written submissions.

2. PROCESSING OF HEARINGS

The processing of appeals/applications, which is performed by the Tribunal staff, includes all administrative steps necessary to schedule and resolve an appeal/application from the date of filing to the closing of the file. For example, when an appeal/application is received, it is dealt with through an administrative process that includes:

- reviewing the appeal/application to assess its validity;
- acknowledging the appeal/application and requesting further information, if required;
- scheduling the hearing;
- monitoring and managing the case throughout the process;
- posting orders and the final written decision on the website.

3. CONDUCTING MEDIATION

The use of mediation in the hearing process encourages the parties to discuss the issues in dispute in an attempt to narrow or settle their differences. The successful results often eliminate the need for a hearing or reduce the scheduled number of days.

The Members who conduct Tribunal mediations have received certified training. Mediation, which is offered in all appeal and application hearings (except in matters under the *NEPDA, Oak Ridges Moraine Conservation Act, 2001* and the *Greenbelt Act, 2005*) is conducted after a preliminary hearing and generally, 30 days prior to the commencement of the main hearing. Should the parties choose not to participate at that time, mediation services are available throughout the hearing process, upon request.

4. PROVIDING PUBLIC ACCESS

The Tribunal's outreach function consists of a number of services that are provided on the website. These include Guides that explain the Tribunal's role and procedures, and up-to-date information regarding the activities of the Tribunal and e-filing. The website lists the appeals/applications received, hearings scheduled, status of cases, hearing locations and also provides access to decisions, orders and forms, relevant statutes and the Tribunal's Rules of Practice and Practice Directions, Conflict of Interest Rules and the Tribunal Complaints Policy.

The Tribunal's outreach function also includes staff responses to questions from parties, public speaking, and stakeholder consultation. The Tribunal seeks feedback regarding new Rules, policies and procedures from its Client Advisory Committee.

The Tribunal also sends out questionnaires following hearings and mediations in order to receive feedback on its performance. The Tribunal welcomes comments regarding its new policies, procedures and general operational processes and encourages the use of the feedback form posted on its website. The public can also address questions to the Tribunal through an email address erttribunalsecretary@ontario.ca.

The Tribunal's Rules of Practice and Practice Directions

The Tribunal's Rules of Practice and Practice Directions are reviewed and revised as circumstances and new legislation dictate in order to reflect the changing needs of the Tribunal and the public. The Tribunal provides an opportunity for its Client Advisory Committee, consisting of a number of stakeholders, to review its Rules when revisions are made. The Tribunal's Rules of Practice and Practice Directions are available on the Tribunal's website or by paper copy, upon request.

In-House Learning Programs

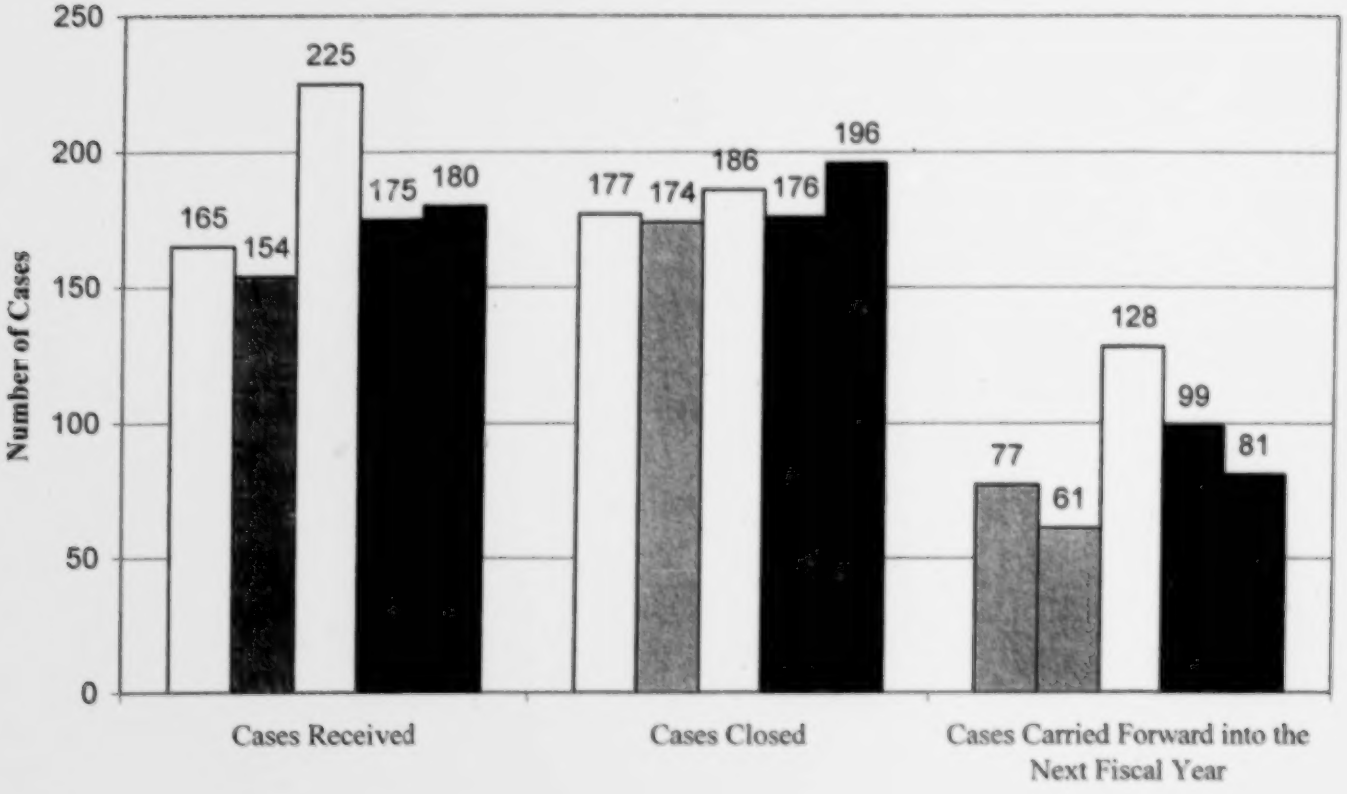
The Tribunal continues to conduct in-house Learning Programs and training sessions for its Members and staff. The Learning Programs and training sessions provide opportunities for the Tribunal to invite and hear guest speakers and to receive information on relevant administrative, environmental and planning law issues. This fiscal year, the Members' training sessions included attendance at two webcasts entitled "The Six-Minute Administrative Lawyer 2009" from the Law Society of Upper Canada and "Awareness to Action" an OPS Forum on Working with First Nations and Métis provided by the Ministry of Aboriginal Affairs. The Tribunal also hosted a number of outstanding speakers at its Learning Programs. See Appendix C for a complete list of Learning Programs held during this fiscal year.

Tribunal Activities for 2008-2009

Case Type	No. of Unresolved Cases from 2007-2008	No. of New Cases Received	No. of Cases Resolved by Decision	No. of Cases Resolved by Approved Settlements	No. of Cases Closed by Other Means*	No. of Cases Carried Forward into 2009-2010	No. of Hearing Days held**	No. of Motion Days held	No. of Mediation Days held	No. of Pre-Hearing Conference Days held	No. of Requests for Costs/ Review
EPA											
Appeals	49	70	18	32	24	45	81	26	31	N/A	2
OWRA											
Appeals	15	7	3	10	3	5	11	3	8	N/A	
SDWA, 2002											
Appeals	2	8	1	1	6	3	1	0	0	N/A	
NEPDA											
Development Permit Appeals	31	78	37	0	49	21	13	7	N/A	32	
CHA											
Applications	0	3	3	0	0	3	3	0	0	N/A	
EBR, 1993***											
Leave to Appeal Applications	2	14	8	0	4	4	0	0	0	N/A	1****
Total	99	180	67	43	86	81	109	36	39	32	3

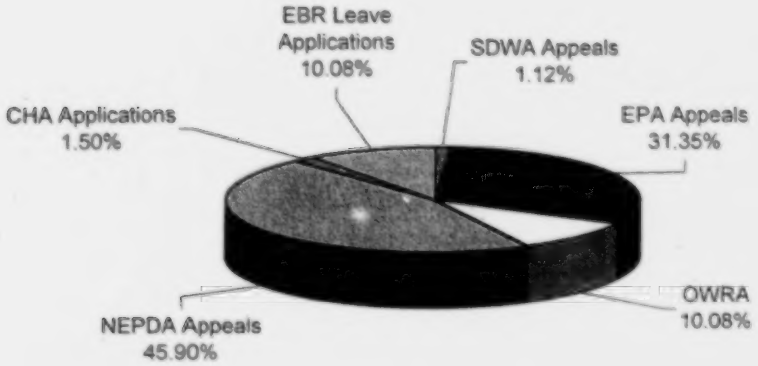
* Withdrawal by applicant/appellant; case abandoned
** Includes Preliminary Hearings
*** Written Hearings
**** Number of Requests for Review

Five Year Trend of Cases Received, Closed and Carried Forward 2004-2005 to 2008-2009

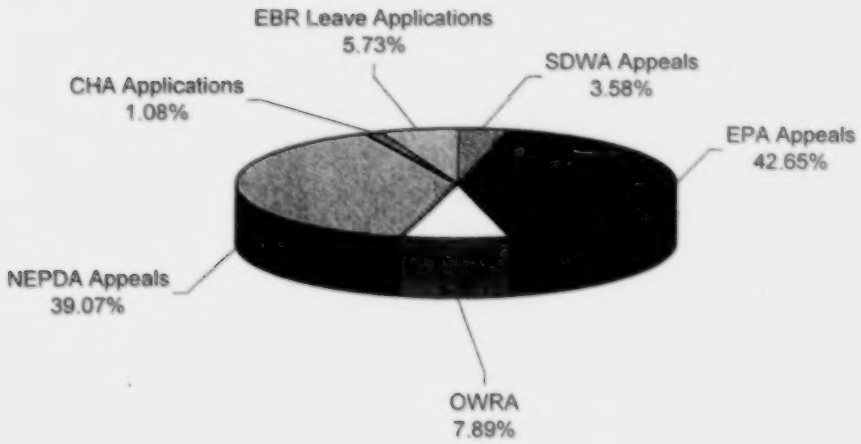


NOTE: Since cases carried forward are still active, the statistics reported may change following the release of the Annual Report. In the 2007-2008 Annual Report, the number of cases carried forward for 2004-2005 and 2005-2006 were incorrectly reported as 76 and 60.

Total Number of Cases in 2007-2008 by Case Type



Total Number of Cases in 2008-2009 by Case Type



Total Number of Appeals/Applications Received by Case Type

Fiscal Years 2004 – 2005 to 2008 – 2009

	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009
Environmental Bill of Rights, 1993	11	8	48	8	14
Environmental Protection Act	49	41	52	37	70
***NEPDA* – Development Permits**	74	82	105	110	78
Nutrient Management Act, 2002	0	1	0	0	0
Ontario Water Resources Act	11	15	18	18	7
Pesticides Act	0	1	0	0	0
Safe Drinking Water Act, 2002	15	0	1	2	8
Clean Water Act, 2006*	N/A	N/A	N/A	N/A	0

* **Date Proclaimed June 3, 2007**

Total Number of Requests for Hearing Received

Fiscal Years 2004 – 2005 to 2008 – 2009

	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009
Consolidated Hearings Act	5	2	1	0	3
***NEPDA* – Plan Amendments**	0	4	0	0	0
Oak Ridges Moraine Conservation Act, 2001*	N/A	N/A	0	0	0
Greenbelt Act, 2005**	N/A	N/A	N/A	0	0

* On July 31, 2006, the Tribunal received authority to be the Hearing Officer

** On July 6, 2007, the Tribunal received authority to be the Hearing Officer

Consolidated Hearings under the *Consolidated Hearings Act*

The Environmental Review Tribunal has administrative responsibility for the *Consolidated Hearings Act* (*CHA*). This administrative responsibility is conducted under the designation of the Office of Consolidated Hearings. During 2008-2009, the Office of Consolidated Hearings received three requests for a consolidated hearing.

The following table sets out the legislation relevant to those requests for consolidation filed with the Office of Consolidated Hearings.

Case Name and Number	***Aggregate Resources Act***	***Niagara Escarpment Planning and Development Act*** (Development Permit)	***Ontario Water Resources Act***	***Planning Act***
Nelson Aggregate Co. (08-030)	X	X		X
Walker Aggregates Inc. (08-094)	X	X		X
Ponderosa Nature Resort (08-179)			X	X

Summaries of Decisions and Significant Orders

The following are summaries of all decisions issued this fiscal year, except those cases where the Appellant, Applicant or Proponent withdrew before a Hearing. Summaries of significant orders are also included. All references to the Tribunal's Rules of Practice reflect those provisions that were in place at the time the decision or order was issued.

Environmental Bill of Rights, 1993

Miller v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), John Miller (the "Applicant") sought Leave to Appeal the decision of the Director, Ministry of the Environment ("MOE") to issue a Permit to Take Water ("PTTW") to Cameco Corporation ("Cameco") for the purpose of Cameco's uranium conversion facility in Port Hope. The MOE posted notice of the decision on the *EBR* registry on March 12, 2008. Pursuant to section 40 of the *EBR*, the deadline for filing an application for Leave to Appeal is 15 days after the posting of the decision on the *EBR* registry. In this case, the deadline was March 27, 2008.

On March 25, 2008, the Applicant sent four copies of the Leave to Appeal application by Priority Courier and Express Post to the Tribunal, the MOE, the Environmental Commissioner, and Cameco. Three of the packages were delivered on March 26, 2008; however, the package to the Tribunal was not delivered at this time. The Applicant, in response to correspondence received from the Tribunal, re-sent the application by courier. The Tribunal received the re-sent application on April 8, 2008, and the original application was received on April 10, 2008. The Applicant submitted that the deadline should be extended because the intent of the legislation is to allow public input and the failure of the courier service was outside of his control.

The issue before the Tribunal was whether the Tribunal could accept applications filed after the *EBR* deadline.

The Tribunal found that it had no inherent jurisdiction to extend the timeline in the *EBR* unless the events constituted a "force majeure". The Tribunal also found that the Tribunal has to physically receive the application within the 15-day deadline in order to satisfy the *EBR*. Having found that the failure of the courier service did not constitute a force majeure and that the Tribunal did not receive the application until after the deadline, the Tribunal dismissed the Leave to Appeal application for lack of jurisdiction.

Decision Released: May 28, 2008 (Case No.: 08-001)

Miller v. Director, Ministry of the Environment (Order)

Pursuant to Rules 227-230 of the Tribunal's Rules of Practice (the "Rules"), John Miller (the "Applicant") filed a Motion for the Tribunal to review its decision dated May 28, 2008 that dismissed the Applicant's Leave to Appeal application. The Applicant was seeking Leave to Appeal, pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), of the decision of the Director, Ministry of the Environment, to issue a Permit to Take Water to Cameco Corporation. The Leave to Appeal application was dismissed under the *EBR* for lack of jurisdiction because the application was filed with the Tribunal after the 15-day *EBR* deadline.

The Applicant's Motion to review was based on two separate grounds. In support of the first ground of review, the Applicant provided additional information concerning the circumstances of his failed attempt to file his application with the Tribunal on time. The second ground for review related to an Environmental Appeal Board (the "Board") decision *Hunter, Re* (1995), 18 C.E.L.R. (N.S.) 22 ("*Hunter*"). The Applicant submitted that in *Hunter*, the Board appeared willing to accept that service on one Party, in that case the Environmental Commissioner, was adequate proof that the 15 day *EBR* deadline was satisfied.

The Tribunal outlined its review process before coming to a finding on the main issue. The Tribunal found that there is a lower threshold of review for decisions without a right of appeal; such is the case for applications brought under the *EBR*. The Tribunal said that the factors to be considered under Rule 230 of the Rules are the same; however the Tribunal found that the depth of review should be greater given that no appeal is possible.

Ultimately, the Tribunal dismissed the Applicant's Motion to review. In coming to this decision, the Tribunal found that the Applicant did not introduce new evidence that showed the circumstances amounted to a "force majeure" event. Also, the Tribunal reiterated its position that the Tribunal did not have jurisdiction to extend the 15-day deadline and that the Tribunal must physically receive the application in order to satisfy the deadline. The decision in *Hunter* does not stand for the proposition that serving notice on only one of the interested parties is adequate to satisfy the 15-day filing period in the *EBR*.

Order released: June 26, 2008 (Case No.: 08-001)

Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment (Order)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), Greenspace Alliance of Canada's Capital and Sierra Club of Canada (the "Applicants") sought Leave to Appeal the decision of the Director, Ministry of the Environment ("MOE") to issue a Permit to Take Water ("PTTW") to Findlay Creek Properties Ltd. ("Findlay Creek") for the purpose of temporary dewatering to facilitate the construction of sewage and water lines at a housing development site known as Findlay Creek Housing Development (the "Site"). The PTTW was issued pursuant to section 34 of the *Ontario Water Resources Act* ("*OWRA*"). The Site houses a provincially recognized, significant wetland known as the Leitrim Wetland.

Findlay Creek has been developing the Site since the 1990s. Over the years, several temporary PTTW's were issued for construction dewatering, construction of a storm water management system, and the installation of water and sewer servicing. The proposal for the PTTW that was the subject of this Hearing was filed by Findlay Creek on August 8, 2007 and at that time indicated the water would be taken for 360 days. The Director concluded that the water taking could occur for more than a year and advised Findlay Creek that the PTTW would be posted on the *EBR* registry for a 30-day comment period. Findlay Creek subsequently changed their proposal to two years. The Director decided that he was not comfortable issuing the PTTW for the two year period due to the level of public concern. Once this was communicated, Findlay Creek limited their application to a period of nine months. The PTTW was ultimately issued with an expiry date of eight months.

Findlay Creek filed a Motion seeking an order dismissing the Leave to Appeal application for lack of jurisdiction and striking the evidence filed in support of the application. The following issues were before the Tribunal:

1. Whether Findlay Creek's application for the PTTW constituted a Class I proposal for an instrument thereby granting jurisdiction to the Tribunal to hear the Leave to Appeal application.
2. Whether the Tribunal should strike certain evidence that was allegedly obtained in contravention of the *Trespass to Property Act.*
3. Whether the Tribunal must disqualify a witness from giving evidence produced through the practice of professional geoscience as defined in the *Professional Geoscientists Act* ("*PGA*") if the proposed witness is not authorized under this statute to practice geoscience.

Issue 1: According to the *EBR*, a Class I proposal is defined as a proposal for a permit pursuant to section 34 of the *OWRA* that would authorize the taking of water over a period of one year or more. The Tribunal found that "proposal" is not necessarily synonymous with "application" and that "proposal" must be interpreted in light of the environmental statute. As such, under the *OWRA,* the Director is required to determine whether the proposal would require authorization to take water for a time period different than the duration of the permit requested by the applicant. The final determination by the Director must be done though a realistic assessment of the undertaking. Ultimately, the Tribunal accepted the Director's evaluation that Findlay Creek's application for the PTTW would authorize the taking of water for one year or more and, therefore, the Tribunal found it had jurisdiction to hear the Leave to Appeal application.

Issue 2: Findlay Creek sought to strike the evidence of the Applicants on the basis that the photographs taken of the Site could only have been obtained by trespassing on Findlay Creek's property. The Tribunal found that at common law, all relevant evidence is admissible regardless of the means by which it is obtained. In addition, the *Statutory Powers Procedure Act* provides the Tribunal a broader latitude to admit evidence which otherwise would not be admissible in a court.

Issue 3: Because the Applicants did not particularize the subject area for which they sought to qualify their expert witness, the Tribunal found it was premature to address this part of Findlay Creek's motion. As such, the Tribunal directed that there would be a Hearing conducted to

determine the subject area for which the Applicants sought to qualify their expert and whether the proposed qualification would involve any aspect of the practice of professional geoscience. The Tribunal also advised the Parties that they should be prepared to provide further argument on the relationship (if any) between unauthorized practice of geoscience and the admissibility of expert evidence.

The Tribunal dismissed Findlay Creek's Motion to Dismiss.

Order released: July 21, 2008 (Case Nos.: 07-164 and 07-165)

Friends of Rural Communities and the Environment v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), Friends of Rural Communities and the Environment (the "Applicant") sought Leave to Appeal the decision of the Director, Ministry of the Environment ("MOE") to issue a Permit to Take Water ("PTTW") to St. Marys Cement Inc. ("St. Marys") for the purpose of conducting pumping tests to understand the impacts of quarry dewatering on the aquifer and watershed and to test St. Marys proposed groundwater re-circulation system for its proposed aggregate extraction operations. The PTTW was issued pursuant to section 34 of the *Ontario Water Resources Act* ("*OWRA*").

On September 28, 2006, St. Marys applied for a temporary PTTW that would involve the taking of water for up to 20 days in three phases over a period of five weeks within the space of nine months. On October 13, 2006, the MOE posted the application on the *EBR* Registry and invited the public to make comments. The MOE received 532 comments on the proposed PTTW including comments from the Applicant. The Applicant objected to the proposed PTTW being granted in the manner proposed. On July 8, 2008, the MOE issued the PTTW for three independent pumping tests, each taking place over an expected period of six days, which could be extended up to eight days by the Director. The PTTW was issued for a duration of 357 days. Under section 38(1) of the *EBR*, the Tribunal has jurisdiction to hear leave to appeal applications respecting a Class I or Class II instrument. The *OWRA* defines a Class I instrument as a permit that would authorize the taking of water over a period of one year or more. Therefore, the issue before the Tribunal was whether the PTTW constituted a Class I proposal thereby granting jurisdiction to the Tribunal to hear the application.

The Tribunal found that while the Director must assess the true nature and extent of the proposed water taking independent of the time periods stipulated on the application, in this case neither the proposal nor the permit, as issued, contemplated the taking of water over a period of one year or more. The Tribunal noted, however, that the Director stated he would almost certainly post on the *EBR* Registry any additional proposals for this project, as additional proposals would render this project a proposal that would authorize the taking of water over a period of one year or more.

The Tribunal dismissed the application for lack of jurisdiction.

Decision Released: August 28, 2008 (Case No.: 08-053)

Marshall v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), James Marshall and Etienne Saint-Aubin (the "Applicants") sought Leave to Appeal the decision of the Director, Ministry of the Environment ("MOE") to issue an Amendment to a Provisional Certificate of Approval (Waste Disposal Site) ("Amended CofA") to Domtar Inc. ("Domtar"). The amendment allowed for the disposal of wastes resulting from the demolition of the Domtar Mill and the conditional disposal of non-hazardous contaminated soil from the Mill Residue Landfill in Cornwall, Ontario. Collectively, the Applicants submitted that they had seven grounds of appeal. The MOE, on the other hand, submitted that the Applicants had not met the *EBR* section 41 test, as discussed in *Dawber v. Ontario (Director, Ministry of the Environment)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.) ("*Dawber*").

Prior to making a finding on the main issue of whether the section 41 test was met, the Tribunal revisited the responsibility of applicants to provide sufficient evidence to the Tribunal. Referring to *Dawber*, the Tribunal said that the section 41 test has a threshold lower than the balance of probabilities, however the applicant must still submit sufficient evidence for the Tribunal to come to a decision.

With regards to the first part of the section 41 test, the Applicants submitted that the public participation process was inadequate, that the Director failed to consider Domtar's compliance history, that the Director failed to consider relevant geologic and seismic data, that the Director failed to consider alternative remediation solutions, and that the Director's decision adds to historical blights. In this light, the Applicants did not take issue with any specific condition in the Amended CofA, but rather they attacked the public process that preceded the Director's decision. Domtar, on the other hand, submitted that the Applicants had not put forward qualified evidence in support of their allegations.

With regards to the Applicants' arguments, the Tribunal found that the public process mandated by the *EBR* is one of the relevant laws that may be considered under the first part of the section 41 test. However, the Tribunal did not find the public process in this case to be inadequate. The Tribunal agreed with the Applicants that Domtar's compliance history was a relevant consideration because a history of non-compliance may be grounds to refuse to issue an approval. In this case, however, the Tribunal found that Domtar's history of non-compliance was over 10 years old and that the Amended CofA contained specific provisions requiring a remediation plan and prohibited the disposal of hazardous waste on the site. Therefore, the Tribunal did not find the MOE to have acted unreasonably by not taking into consideration the previous incident. For all the other arguments submitted by the Applicants, the Tribunal found that there was inadequate evidence to support the allegations.

With regard to the second part of the section 41 test, the Tribunal found that the Applicants' argument that the Director's decision would result in significant environmental harm lacked detail and evidentiary support. The Tribunal reiterated the need for adequate evidence to support the

assertion that the Applicants meet the section 41 test. The Tribunal again referred to *Dawber* and the evidentiary burden found therein.

As both parts of the section 41 test were not met, the Tribunal dismissed the application for Leave to Appeal.

Decision released: September 10, 2008 (Case Nos.: 08-051 and 08-052)

Greenspace Alliance of Canada's Capital v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), Greenspace Alliance of Canada's Capital and Sierra Club of Canada (the "Applicants") sought Leave to Appeal the decision of the Director, Ministry of the Environment ("MOE") to issue a Permit to Take Water ("PTTW") to Findlay Creek Properties Ltd. ("Findlay Creek") for the purpose of temporary dewatering to facilitate the construction of sewage and water lines at a housing development site known as Findlay Creek Housing Development (the "Site"). The PTTW was issued pursuant to section 34 of the *Ontario Water Resources Act* ("*OWRA*"). The Site houses a provincially recognized significant wetland known as the Leitrim Wetland.

On September 30, 2008, the PTTW expired. On November 3, 2008, the Director sent correspondence to the Tribunal indicating that all the Parties agreed that the proceeding was now moot. The Tribunal applied the mootness test from *Borowski v. Canada (Attorney General)* [1980] 1 S.C.R. 342 and found that the tangible and concrete dispute had disappeared and that there was no longer a live controversy. As neither Party requested that the Tribunal exercise its discretion to hear the Leave Application, the Tribunal dismissed the Leave to Appeal application.

Decision Released: November 27, 2008 (Case Nos.: 07-164 and 07-165)

Baker v. Directors, Ministry of the Environment (Decision)

Pursuant to section 38(1) of the *Environmental Bill of Rights, 1993* ("*EBR*"), Martin J. Hauschild and William Kelley Hineman on behalf of Loyalist Environmental Coalition, Lake Ontario Waterkeeper and Gordon Downie, Gordon Downie, Gordon Sinclair, Robert Baker, Paul Langlois and John Fay, and Susan Quinton on behalf of Clean Air Bath (the "Applicants") sought Leave to Appeal two Certificates of Approval ("CofAs") issued by two Directors, Ministry of the Environment ("MOE"). The Directors had issued the CofAs to Lafarge Canada Inc. ("Lafarge") under section 9 of the *Environmental Protection Act* ("*EPA*"). The first of the CofAs permitted Lafarge to operate a Portland cement manufacturing facility, and the second, a Provisional Certificate of Approval, permitted Lafarge to operate a waste-disposal site. Both Approvals related to property in Loyalist Township in the County of Lennox and Addington.

On April 4, 2007, in *Dawber v. Director, Ministry of the Environment*, 29 C.E.L.R. (3rd) 281, the Tribunal granted leave to appeal both CofAs to the Applicants. An appeal was filed on April 19, 2007; the Hearing of the appeal was adjourned as Lafarge sought Judicial Review of the Tribunal's Leave to Appeal Decision to the Divisional Court. On June 18, 2008, the Divisional Court released

its decision dismissing Lafarge's application. The Hearing of the appeal was further adjourned pending the outcome of Lafarge's Motion before the Court of Appeal requesting leave to appeal the decision of the Divisional Court. On November 28, 2008, the Court of Appeal dismissed the application for leave to appeal.

On December 18, 2008, a status update occurred in this matter via teleconference. Counsel for the Directors confirmed that the Directors proposed to revoke both CofAs as requested by Lafarge. None of the Parties opposed the revocation and, consequently, they consented to a dismissal of this matter.

The Tribunal found that the proposed revocation of the CofAs was consistent with the purposes and provisions of the *EPA* and was not contrary to the public interest. The Tribunal, therefore, dismissed the appeals.

Decision Released: December 22, 2008 (Case Nos.: 07-009 to 07-016)

Tomagatick v. Director, Ministry of the Environment (Order)

Pursuant to section 38 of the *Environmental Bill of Rights*, Emelda and Clara Tomagatick (the "Applicants") sought Leave to Appeal a Permit to Take Water ("PTTW") issued by the Director, Ministry of the Environment ("MOE") to De Beers Canada Inc. ("De Beers"). The PTTW was for water taking from Victor Open Pit Well Field in the District of Kenora, Ontario.

On October 15, 2008, the Tribunal received correspondence from the Applicants stating that they "wished to appeal the Director's decision" to issue the PTTW. The Applicants then secured legal representation and their Leave to Appeal documents were filed on November 17, 2008. De Beers and the MOE filed responding documents on December 19, 2008. In the meantime, the Applicants filed reply documents on December 12, 2008. On December 16, 2008, the MOE asked the Tribunal to expunge certain paragraphs from the Applicants' reply documents on the basis that those paragraphs raised new issues and evidence that should have been submitted in the original submissions.

On December 15, 2008, the Tribunal received correspondence from the Chief of the Attawapiskat First Nation requesting that the Attawapiskat First Nation be granted Presenter status in the Hearing for the application for Leave to Appeal. The Attawapiskat First Nation sought this status in order to have the Tribunal consider information contained in a letter that was addressed to the Tribunal from the Chief of the First Nation.

There were two issues before the Tribunal:

1. Whether the Attawapiskat First Nation should be granted Presenter status in the Hearing for the application for Leave to Appeal.
2. Whether certain paragraphs and corresponding supporting documents should be expunged from the Applicants' reply submissions.

The Tribunal found as follows:

1. The Attawapiskat First Nation was directly affected by the Hearing or its results and was likely to make relevant contributions. Accordingly, the Tribunal granted Presenter status to the Attawapiskat First Nation in the Hearing for the application for Leave to Appeal.
2. It is expected that an applicant for Leave to Appeal will put forward its entire case. Therefore, applications must raise all issues that could reasonably be anticipated and provide all relevant supporting documents of which applicants are aware. An applicant, in reply, may not raise new issues it could have raised earlier or address issues that it could have raised earlier. Accordingly, the Tribunal expunged certain paragraphs from the Applicants' reply documents.

Order Released: January 15, 2009 (Case Nos.: 08-095, 08-097 to 08-101)

Tomagatick v. Director, Ministry of the Environment (Decision)

Pursuant to section 38 of the *Environmental Bill of Rights* ("*EBR*"), Emelda Tomagatick and Clara Tomagatick (the "Applicants") sought Leave to Appeal a Permit to Take Water ("PTTW") issued by the Director, Ministry of the Environment ("MOE") to De Beers Canada Inc. ("De Beers"). The PTTW was for water taking from Victor Open Pit Well Field in the District of Kenora, Ontario.

The issue in this proceeding was whether the Applicants met the two-part test in section 41 of the *EBR*. The first part of the two-part test involves a consideration of whether "there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision." The second part of the two-part test involves a consideration of whether "the decision in respect of which an appeal is sought could result in significant harm to the environment."

Under the first part of the test, the Applicants raised three grounds of appeal. The first ground was that the Director's decision failed to have regard for government commitments to reduce and eliminate discharges of mercury throughout Ontario. The second ground was that the Director's decision failed to have regard for the MOE Statement of Environmental Values ("SEVs"). The third ground was that the Director's decision failed to have regard for the common law rights of the Applicants.

With regard to the first ground, the Applicants relied on a multi-national agreement between Canada and the United States of America by which the countries committed to certain objectives, including the virtual elimination of persistent toxic substances, in the Great Lakes. The Tribunal found that the Province of Ontario was not a party to this agreement; therefore, it was reasonable for the Director to not refer to this agreement when deciding whether to issue the PTTW. With regard to the second ground, the Tribunal found that, overall, the Applicants failed to lead adequate evidence to establish that the Director failed to consider the SEVs. With regard to the third ground, the Tribunal found that a condition in the PTTW provided that the PTTW was not to be construed as

precluding or limiting any legal claims or rights of actions that any person may have. Therefore, with regard to the first part of the test as a whole, the Tribunal found that it was not met.

As the Tribunal found that the first part of the section 41 test was not met, the Tribunal did not need to consider the second part of the test. Accordingly, the Tribunal denied the Application for Leave to Appeal.

Decision Released: March 9, 2009 (Case Nos.: 08-095 to 08-097)

Environmental Protection Act

Dow AgroSciences Canada Inc. v. Director, Ministry of the Environment (Decision)

Dow AgroSciences Canada Inc. and Procyk Farms (1994) Limited (the "Appellants") appealed an Order issued by the Director, Ministry of the Environment ("MOE"), under section 157.3 of the *Environmental Protection Act* ("*EPA*"). The Order was in response to a spill of an estimated 1,200 litres of pesticide Telone C-17 and groundwater contamination on a farm property owned by Procyk Farms (1994) Limited in Windham, County of Norfolk (the "Site"). The Order required the Appellants to conduct investigations at the Site, to provide a new plume delineation report and a remedial action plan to address and manage, if necessary, groundwater and soil contamination on site and off-site.

The issue before the Tribunal was whether the settlement agreement, as reflected in the Minutes of Settlement, was consistent with the purpose and provisions of the *EPA* and was in the public interest pursuant to Rule 193 of the Tribunal's Rules of Practice. Included in the Minutes of Settlement was the requirement that the Appellants carry out a proposed 2008 Field Program at the Site. The MOE agreed that full completion of the 2008 Field Program would constitute full compliance with the terms and requirements of the Director's Order. The Tribunal found that there was no evidence indicating that the Minutes of Settlement were inconsistent with the environmental protection purpose of the *EPA*, or that they were not in the public interest. Pursuant to Rule 193, the Tribunal accepted the settlement agreement as reflected in the Minutes of Settlement and the withdrawal of the appeals by the Appellants. The Tribunal, therefore, dismissed the appeals.

Decision released: April 30, 2008 (Case Nos.: 07-067 and 07-068)

The Corporation of the Municipality of Killarney v. Director, Ministry of the Environment (Decision)

The Corporation of the Municipality of Killarney (the "Appellant") appealed an Order issued by the Director, Ministry of the Environment under section 157.3(5) of the *Environmental Protection Act* ("*EPA*"). The Order required the Appellant to develop and submit an updated Closure Plan and an Action Plan for the Killarney Landfill located in the Municipality of Killarney, District of Sudbury (the "Site").

The issue before the Tribunal was whether the settlement agreement reached by the Parties was consistent with the purpose and provisions of the *EPA* and was in the public interest pursuant to Rule 193 of the Tribunal's Rules of Practice. The Tribunal noted that Counsel for the Director had assured the Tribunal that once the terms of the settlement agreement had been implemented, the Appellant will have submitted an updated Closure Plan and the Site will have leachate controls in place. The Tribunal found that the terms of the settlement agreement were consistent with the purposes and provisions of the *EPA* and were in the public interest pursuant to Rule 193. Accordingly, the Tribunal accepted the settlement agreement and dismissed the appeal.

Decision released: April 17, 2008 (Case No.: 07-086)

The Municipality of West Grey v. director, Ministry of the Environment (Decision)

The Municipality of West Grey ("West Grey") appealed portions of an Order issued by the Director, Ministry of the Environment, under sections 18, 196(1), and 196(2) of the *Environmental Protection Act* ("*EPA*"). The Order required West Grey to implement or supervise the implementation of a remediation alternative to prevent South Saugeen River bank instability from impacting sewage lagoons situated at the Neustadt Sewage Works. In November 2006, the Tribunal adjourned the Hearing to allow West Grey to investigate alternative sources of funding, and to permit the Parties to discuss settlement. In March 2008, the Director revoked the Order pursuant to a confidential settlement agreement with West Grey, and West Grey advised the Tribunal that it would withdraw its appeal.

Since the settlement agreement altered the decision that was under appeal, the Tribunal considered whether the settlement agreement and the revocation of the Order were consistent with the purpose of and provisions of the *EPA* under Rules 193 and 194 of the Tribunal's Rules of Practice. The Tribunal noted that both Parties had advised it that the confidential settlement agreement provided that the work required by the Director's Order would be undertaken by or on behalf of West Grey. The Tribunal found that the settlement agreement and revocation provided for the protection and conservation of the natural environment and was in the public interest. Accordingly, the Tribunal accepted the settlement agreement and West Grey's withdrawal of the appeal, and dismissed the appeal.

Decision released: April 25, 2008 (Case No.: 06-110)

Brown v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), J. Edwin Brown, Ruth E. Brown, and J. Edwin Brown Holdings Incorporated (the "Appellants") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding a sewage system in a mobile home park located in the United Counties of Leeds and Greenville, Ontario (the "Site").

The Order required the Appellants to block the septic tank discharge to the tile bed and to regularly pump the septic tank until a permanent replacement sewage system had been installed and was

operational. The Appellant appealed this Order on the basis that the septic tank was not faulty and the tile bed was effectively accepting the inflow of sewage.

The Appellants' requests for a stay of the Director's Order were based on the proposition that the perceived threat to the environment and the tenants at the Site is overstated. Also, the Appellant submitted that he was effectively managing the sewage system and that he would not tolerate any situation that would put the tenants' health and wellbeing at risk.

The MOE submitted that sections 143(3) of the *EPA* and 102(3) of the *Ontario Water Resources Act* prevented the Tribunal from granting a stay in this matter because there was evidence that the sewage system posed a danger to the health and safety of the residents on the Site.

The Tribunal accepted the submissions of the MOE and found that there was evidence that the sewage system in question needed to be repaired or replaced, resulting in a discharge of raw sewage into the environment. Also, the Tribunal found that raw sewage may contain a variety of bacteria, viruses, and pathogens which pose a health risk to any person that may come into contact with them and pose a risk of impairment to the natural environment.

The Tribunal, therefore, dismissed the Motion for a stay.

Order Released: July 3, 2008 (Case No.: 07-170)

CanRoof Corporation Inc. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), CanRoof Corporation Inc. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order requiring the Appellant to retain qualified consultants and submit a draft and final Odour Abatement Action Plan ("OAAP") to the MOE. The Order related to the Appellant's plant in Toronto, Ontario that manufactures asphalt shingles and related roofing materials (the "Site").

The Preliminary Hearing started on October 1, 2007 at which time the Toronto Transit Commission ("TTC") and SmartCentres Inc. were added as Parties and Paul Young and Stephen Gelder, local residents, were added as Presenters. The Preliminary Hearing continued on January 24 and February 7, 2008 at which time the Parties advised the Tribunal that settlement discussions were ongoing and draft Minutes of Settlement (the "Draft MOS") were being circulated. The Draft MOS required the Appellant to draft and submit the OAAP and provided that the Consolidated Certificate of Approval would not include any specific detailed odour provisions. In addition, the Appellant requested that the Parties sign a confidentiality agreement before it would share information about that date of preparation of the OAAP. Because the Parties intended to settle this dispute via a negotiated settlement, the Appellant sought to withdraw its appeal.

The proposed terms of the Draft MOS were not agreed to by all the Parties. The TTC made submissions to the Tribunal asking it to make changes to the scope, timeframe, and performance objectives for the OAAP. Therefore, one of the questions in issue was the limitation on the Tribunal to clarify or strengthen the Director's Order. Applying the principles in *Uniroyal Chemical Ltd.*

(1992), 9 C.E.L.R. (N.S.) 151, the Tribunal found it could go beyond the options that were considered by the Director and fashion a new solution, however it does not have unlimited jurisdiction. The jurisdiction is constrained to the subject matter of the proceeding, the underlying powers that the Director may exercise in accordance with the act and regulation, and the purpose of the legislation. The Tribunal found that the subject matter of CanRoof's appeal was whether it should be required to prepare an OAAP, and not the specific requirements of that plan. As such, the Tribunal found that many of the concerns raised by the TTC were premature in the sense that they can be dealt with in a later step of the approval process.

The ultimate issue in this proceeding was whether the proposed withdrawal of the appeal was consistent with the purposes and provisions of the *EPA*, the Rules of Practice of the Environmental Review Tribunal (the "Rules"), and was in the public interest. The Tribunal found that the changes to the Draft MOS requiring two reviews of the OAAP and the inclusion of the confidentiality agreement to be consistent with the provisions of the *EPA*, consistent with the Rules, in the public interest, and in the interest of the Parties and the Presenters. Accordingly, the Tribunal accepted the withdrawal of the appeal and dismissed the appeal.

Decision released: August 8, 2008 (Case No.: 07-052)

Heitto v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), R & H Automotive and Ron Heitto (the "Appellants"), appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order to the Appellants requiring, amongst other things, an environmental assessment that indicates what action will be taken to remediate the contaminated soil on the Appellants' land in Longlac, Ontario (the "Site"). The Appellants operate a service and gasoline station at the Site and recently the MOE had received complaints of gasoline and petroleum products going off the Site and impacting neighbouring property owners.

Several years after the commencement of this appeal, the Appellants notified the Tribunal that the work required to achieve compliance with the Order had been completed. Accordingly, the Appellants wished to withdraw their appeals.

The issue, therefore, before the Tribunal was whether to accept the withdrawal of the appeals. As the Appellants had complied with the terms in the Order and the MOE did not object to the withdrawal, the Tribunal accepted the withdrawal and dismissed the appeals.

Decision released: September 10, 2008 (Case Nos.: 06-041 and 06-042)

County of Oxford v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), the County of Oxford (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order requiring, amongst other things, the submission of an application for a Certificate of Approval (Sewage Works) ("CofA"). The CofA is for the installation of sewage works at the

Oxford County Highland Patrol Yard ("Patrol Yard") for the purpose of remedying salt contamination caused by the Appellant.

The Appellant owns the parcel of land that contains the Patrol Yard. The Patrol Yard is used by the Appellant to store and load road salt and pickled sand for use on winter roads. In the past, the salt and pickled sand were stored outside on the property. However, as of 1986, the salt and pickled sand are stored in facilities. There is a creek that runs in a Southerly direction from the Patrol Yard and through to an adjacent property owned by Julius and A. Margaret Abonyi ("Abonyi property") Monitoring by the MOE in 1992 and 1993 disclosed elevated chlorides in the area between the Patrol Site and the Abonyi property - an indication of salt contamination. All Parties agreed that the contamination was the result of the salt and pickled sand being stored outside on the Patrol Yard property.

On January 16, 2006, the MOE issued a Provincial Officer's Order to the Appellant requiring the Appellant to submit a remediation plan for the salt contamination. The Appellant complied with this Order and submitted a report which presented two alternatives: (1) to build a trench 5-6 metres deep at the top of the slope on the Patrol Yard, and (2) to build a much shallower trench in the area between the Patrol Yard and Abonyi property. On June 6, 2006, the MOE issued another Provincial Officer's Order requiring the work proposed in the report to be completed. The Appellant requested a review of this Provincial Officer's Order by the Director. The Director ultimately issued an Order revoking the Provincial Officer's Order and requiring the Appellant to apply for a Certificate of Approval (Sewage Works) for the purpose of installing works on the site to allow for the construction of a 5-6 metre trench. The Appellants appealed the Director's Order to the Tribunal and identified five remediation alternatives: four involving trenches, one involving the natural remediation of the site (i.e. relying on nature to eventually flush the salt from the area).

As a preliminary matter, the Tribunal found that chloride concentrations in excess of 200 mg/L can be considered as a contaminant under the *EPA*. Also, the Tribunal found that the regulation under the *EPA* that exempts salt "used on highways" does not apply in this circumstance.

The issues before the Tribunal were (1) Which remediation alternative should be implemented, and (2) Whether the Order should include monitoring measures.

Regarding the first issue, the Tribunal noted that both the *EPA* and the *OWRA* define "adverse effect" and "deemed impairment" quite broadly. Therefore, an evaluation of multiple alternatives will necessarily include a variety of criteria. However, after a careful consideration of all the evidence, the Tribunal found that there was insufficient evidence to establish whether there would be any appreciable difference in the time required for the remediation of the area when using a trench alternative as opposed to the natural alternative. The Tribunal found, therefore, that the natural remediation alternative should be implemented.

Regarding the second issue, because the Tribunal found that natural remediation should be implemented, the Tribunal included monitoring provisions in the Order.

The Tribunal allowed the appeal and amended the Order accordingly.

Decision released: September 24, 2008 (Case No.: 07-005)

City of Hamilton v. Director, Ministry of the Environment (Order)

Pursuant to section 139 of the *Environmental Protection Act*, the City of Hamilton (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") with respect to Amended Provisional Certificate of Approval (Waste Disposal Site) ("CofA"). The CofA approved a landfill in the City of Hamilton, Ontario.

At the Preliminary Hearing, the Parties indicated to the Tribunal that they were nearing a proposed settlement of most of the CofA conditions under appeal. In addition, the Appellant indicated that it wished to add two CofA conditions to the scope of the appeal. Counsel for the MOE consented to this request.

The Tribunal granted the Appellant's request to add the two conditions to the scope of the appeal.

Order Released: September 29, 2008 (Case No.: 08-022)

Haig v. Director, Ministry of the Environment (Decision)

Pursuant to sections 139 and 140 of the *Environmental Protection Act* ("*EPA*"), Can-Fix Auto and Salvador Haig (the "Appellants") appealed the decision of the Director, Ministry of the Environment ("MOE") to suspend the accreditation of Can-Fix Auto's *Drive Clean* Facility under the *Drive Clean* Program until the end of its existing Performance Contract.

Regulation 361/98 of the *EPA* sets out a number of requirements of the *Drive Clean* Program. Accreditation under the *Drive Clean* Program, however, is done via Performance Contracts. In the Performance Contracts, there is an Appeal Provision that sends appeals to Private Arbitration in the event that no tribunal has jurisdiction to hear the appeal under the laws of the Province of Ontario. The Appellants claimed that the Tribunal had jurisdiction to hear the appeal and that the appeal should not go to Private Arbitration. The MOE claimed that the Tribunal did not have jurisdiction to hear the appeal because the Performance Contract was not a licence, permit, or approval (as per section 139 of the *EPA*).

The Tribunal found that as a creature of statute, it has no jurisdiction other than that conferred on it by statute. As such, the Tribunal would have to find that the Performance Contract was a license, permit, or approval in order to have jurisdiction to hear the appeal. The Tribunal noted that the Performance Contract stipulated that it is a legally binding agreement between the Facility and the Province of Ontario and the Performance Contract was clear that appeals were to go to Private Arbitration. Accordingly, the Tribunal could not find that the Performance Contract was a license, permit, or approval.

As the Tribunal did not find the Performance Contract to be a license, permit, or approval, the Tribunal found that it did not have jurisdiction to hear the appeal. The appeal was dismissed.

Decision released: October 1, 2008 (Case Nos.: 08-025, 08-026, 08-032 and 08-033)

Ultramar Ltée/Ultramar Ltd. v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act*, Ultramar Ltée/Ultramar Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding work in relation to the contamination of drinking water systems as a result of the discharge of hydrocarbons from the Appellant's gas station in the Township of Clearview, Ontario.

On June 17, 2008, the Appellant brought a Motion requesting the revocation of the Director's Order. In accordance with the Rules of Practice and Practice Directions of the Environmental Review Tribunal, the Tribunal ordered that the Parties file written submissions on this matter by August 8, 2008 and that oral submissions be heard on August 28, 2008. The Parties requested a further adjournment to afford them the opportunity to prepare additional written submissions. Accordingly, the Tribunal adjourned the Appellant's Motion until September 17, 2008. All materials were received by this date and the Tribunal formally closed submissions on this matter.

On July 18, 2008, the Tribunal issued an Order confirming that the Tribunal would conduct a Mediation in this proceeding, which was scheduled for October 2 and 3, 2008.

In this particular Order, the Tribunal found that if the Motion brought by the Appellant is successful, it would dismiss the appeal and the Parties would not need to participate in mediation. However, the Tribunal also found that there was not sufficient time to issue an Order with full reasons prior to the commencement of the mediation.

Accordingly, the Tribunal issued this Order to dismiss the Appellant's Motion to Dismiss with written reasons to follow.

See page 31 for the written Reasons issued on November 17, 2008.

Order Released: October 1, 2008 (Case No.: 07-127 to 07-134)

Innis v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Ronald William Innis (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order with regards to remedial work in relation to trichloroethylene contamination of a site in Toronto, Ontario (the "Site").

Pursuant to Tribunal-assisted mediation, the Appellant and the MOE reached an agreement to settle the appeal. The Parties agreed that the Order should be amended to require the Appellant to evaluate and report the amount of contamination at the Site.

As the Parties had reached an agreement, the sole issue before the Tribunal was whether the settlement was consistent with the purposes and provisions of the *EPA* and in the public interest. The Tribunal found that when the amended Order is fulfilled, it is expected to delineate the extent of any contamination on the Site. Accordingly, the Tribunal amended the Order, accepted the withdrawal, and dismissed the appeal.

Decision released: October 7, 2008 (Case No.: 07-135)

AB Crushing Inc. v. Director, Ministry of the Environment (Order)

Pursuant to section 139 of the *Environmental Protection Act*, AB Crushing Inc. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue a Certificate of Approval (Air) ("CofA") to the Appellant. The CofA related to an integrated mobile recycler and contained a number of conditions.

Initially, the Appellant sought only to appeal one condition, mainly, the condition that limited the operations of the mobile recycler to not more than 60 calendar days per year at any one site. The Appellant raised another issue regarding the use of wet dust suppression, however, this issue was expected to be settled via mediation. In relation to the wet dust suppression condition, the Appellant submitted that it was not always feasible to utilize wet dust suppression, for example, at sites where water is unavailable.

Mediation on the wet dust suppression issue did not result in a mediated settlement. Accordingly, the Appellant sought to enlarge the scope of his appeal to include this issue. Counsel for the MOE filed a jurisdictional Motion seeking to strike the wet dust suppression issue from the scope of the Appellant's appeal. The basis of this Motion was that the relief requested by the Appellant is not a matter that was before the Director, therefore, no review of the request had been undertaken by the Director. The Director's submission was that the Appellant had applied for the CofA on the basis that the mobile facility would operate with wet dust suppression and, therefore, the operation of the facility without wet dust suppression was not a matter that was before the Director.

The Tribunal found that there was evidence to suggest that the Appellant made requests to the Director for the relief sought, namely, allowing the Appellant to operate without wet dust suppression. For example, there was evidence of correspondence on this issue between the Appellant and the Director's Review Engineer. The Tribunal found that by omitting to include a condition in the CofA allowing for the operation to be conducted without wet dust suppression in some instances, the Director took action and made a decision.

Relying on *Smith v. Ontario (Director, Ministry of Environment & Energy)* (2003), 1 C.E.L.R. (3d) 245 (Div.Ct.), the Tribunal found that it was up to the Tribunal to examine the context of the Director's decision and to determine whether a ground of appeal is properly within the subject-matter of the hearing. However, the Tribunal added that an applicant should not use the Tribunal to by-pass the Director. In this case, the Tribunal found that it was reluctant to take away the appeal right of the Appellant when the evidence showed that the CofA generally addresses the issue of dust

control, that the Parties clearly discussed the issue of wet dust suppression prior to the issuance of the CofA, and there was some debate as to whether the Director was demanding more of the Appellant than what was set out in the prescribed application procedure.

The Tribunal, therefore, dismissed the Motion to strike the Appellant's ground of appeal relating to wet dust suppression.

Order Released: October 22, 2008 (Case No.: 08-013)

Reeves v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Leonard Reeves and Reeves Land Corporation (the "Appellants") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding waste consisting of metal drums, totes, and containers deposited at a site in the Township of Zorra, Ontario (the "Site"). The Order required that the waste material be removed within certain time limits and set out certain reporting duties with respect to the removal process.

In this particular proceeding, the Appellant was seeking a stay of the Director's Order. The main issue was whether section 143(3) of the *EPA* precludes the Tribunal from granting a stay in this matter.

After reviewing the evidence, the Tribunal found that at least one, if not all three, of the section 143 (3) prongs were met. The Tribunal found that there was a possibility that granting the stay could result in danger to health or safety of any person because the flashpoint of the waste material could be high. The Tribunal also found that there was a serious risk of impairment to the natural environment because of the possibility of off-site leakage and spills.

In the alternative, the Tribunal found that the Appellant did not establish that it would suffer irreparable harm if the stay were not granted because it did not establish that it lacked financial resources. In any event, the Appellant did not establish that it could not seek damages or re-imbursement as against other entities.

The Tribunal, therefore, refused the Motion for a stay.

Order Released: October 24, 2008 (Case Nos.: 08-009 and 08-010)

Innis v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act*, Ronald William Innis (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding remedial work in relation to Trichloroethylene contamination of a site located in the City of Toronto, Ontario (the "Site").

Prior to 1986, Kenneth Norman Bryant and the Appellant were joint owners of an incorporated business known as Kenron Enterprises Inc. ("Kenron"). Because Mr. Bryant died without a will, the sole beneficiaries of his estate were his sister and his brother. Michael Bryant, Mr. Bryant's nephew, agreed to act as administrator of his uncle's estate. At this time, the Site was transferred to the Appellant in a real estate transaction. A "Transfer/Deed of Land" was registered on title in the Provincial Land Registry Office. In the transfer, the transferor was named as "Industrial Chemical Refiners Limited" with the named signing officer being "Michael Bryant, President and Secretary".

In this proceeding, the Appellant filed a Notice of Allegation under the Tribunal's Rules of Practice against Michael Bryant because he appeared on the transfer deed as the former President and Secretary of Industrial Chemical Refiners and thus was a person in charge, management, and control of the entity responsible for the discharge on the Site. On June 5, 2008, in response to the Notice of Allegation, Michael Bryant sought and obtained Party status. Michael Bryant then brought a Motion to the Tribunal asking that he not be named on the Order on the basis that he signed the transfer solely in his capacity as executor of his uncle's estate, and that, at that time, he did not consider himself to be the President and Secretary of Industrial Chemical Refiners. In addition, Michael Bryant asked for costs in the Motion.

During a teleconference, Counsel for the Appellant proposed that the Parties participate in mediation. Counsel further proposed that Michael Bryant's involvement in this matter be settled in this manner. Counsel for Michael Bryant responded that he wished to proceed with a Motion to remove Michael Bryant because, if successful, he could avoid the expense of having to participate in the mediation. Upon reviewing Michael Bryant's submissions on the Motion to be removed, the Appellant offered to withdraw his Notice of Allegation on the condition that Michael Bryant agree to dismiss the Motion without costs. Michael Bryant did not accept this offer. At the outcome of the Motion proceeding, the Tribunal found that there was no basis for naming Michael Bryant as a Party to the Director's Order.

In this particular Order, Michael Bryant brought an application for costs against the Appellant. In support of his claim, Michael Bryant submitted that the Appellant's actions were unreasonable. Pursuant to Rule 217 of the Rules of Procedure and Practice Directions of the Environmental Review Tribunal and section 17.1 of the *Statutory Powers Procedures Act*, the Tribunal may only award costs in the rare case where a Party's conduct warrants such an award. The Party's conduct will warrant such an award when the conduct was unreasonable, frivolous or vexatious, or the Party has acted in bad faith.

In reviewing the Tribunal decision *Johnson v. Ontario (Ministry of the Environment)*, [2006] O.E.R.T.D. No. 20, the Tribunal found that in order to award costs of this nature, the Tribunal must find that the Party has engaged in unreasonable, frivolous, or vexatious conduct, or acted in bad faith. The Tribunal found that it was not unreasonable for the Appellant to advance the argument that as President and Secretary of Industrial Chemical Refiners Limited, Michael Bryant may have had management or control of the undertakings at the Site. Also, the Tribunal found that Michael Bryant did not establish that the Appellant's conduct was unreasonable, frivolous, or vexatious.

The Tribunal, therefore, dismissed the application for costs.

Order Released: October 29, 2008 (Case No.: 07-135)

Kawartha Dairy Ltd. v. Director, Ministry of the Environment (Order)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), Kawartha Dairy Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order requiring the Appellant to develop a noise abatement plan, and to eventually take measures to implement that plan, for the Appellant's facility in the City of Kawartha Lakes, Ontario.

The Order was issued pursuant to noise complaints received by the MOE from the Appellant's neighbour. The main complaint from the neighbour was that due to night-time noises emitted by the Appellant's operations, the family was not able to engage in quality night-time sleep.

As a preliminary matter, the Appellant brought a Motion to stay the Order pending the outcome of the Hearing. The MOE consented to an interim stay, however, challenged the stay request on the basis that the Tribunal did not have jurisdiction to grant a stay because section 143 of the *EPA* applied. In particular, the MOE submitted that section 143 (b) of the *EPA* prevented the granting of a stay because doing so would result in "impairment or serious risk of impairment of the quality of the natural environment for any use that can be made of it." The Appellant submitted that section 143 (b) of the *EPA* does not apply because it refers to the "natural environment" and the activities that occur inside the home of the neighbour, including sleeping, do not take place in the "natural environment".

The Tribunal found that the "natural environment" includes any part of air, land, and water in Ontario, and that the property must be looked at as a whole. Also, pursuant to Supreme Court of Canada decision, *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, the issue of whether the natural environment has been impaired for any use that can be made of it requires a broad consideration of the uses that can be made of a particular area rather than a narrow inquiry.

Ultimately, the Tribunal found that it must consider whether the noise discharged by the Appellant impairs the land or air within the neighbour's property for its use as a residential dwelling. The Tribunal found that taking the approach proposed by the Appellant would require the Tribunal to focus too narrowly on the interior of the home simply because that is where the impact of the noise is experienced the most. Therefore, the Tribunal found that section 143(3)(b) of the *EPA* applied in the circumstances of this case and that the Tribunal was statutorily prevented from granting a stay.

The Tribunal, therefore, refused the Appellant's request for a stay.

Order Released: October 31, 2008 (Case No.: 08-059)

Braun v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Robert C. Braun, Lissom Earth Sciences, and Cascades Canada Inc. (the "Appellants") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding deposits of sludge material and contamination of a site in the County of Oxford, Ontario (the "Site"). This particular Order related to a Motion for a stay.

The focus of this Order was on the production of a Remedial Action Plan ("RAP") for sludge that was deposited at the Site. The RAP was required to include, amongst other things, an assessment of the adverse effects of the sludge and a clean-up action plan with a timetable for implementation. All the named persons on the Order submitted that they were not responsible for the clean-up, rather, they alleged that the other named persons were responsible.

As a preliminary matter, the Parties agreed that section 143 of the *EPA* did not preclude the granting of a stay. The Parties also agreed that the appropriate test for a stay is the three-pronged test articulated in *RJR MacDonald Inc. v. Canada,* [1994] 1.S.C.R. 311 ("*RJR* test") and that the focus of this Order would only be on the last two prongs of the test, namely, the issues of irreparable harm and the balance of convenience.

For irreparable harm, the crux of the Appellants' arguments was that they would suffer irreparable harm if a stay were not granted because they would be liable to prepare the RAP and would not be able to collect damages from the responsible Parties. On this issue, the Tribunal found that the only Party who was able to establish that he would suffer irreparable harm was Mr. Braun. This is because Mr. Braun was able to demonstrate that even if he was successful in his appeal, he did not have the necessary funds to initiate a civil action to recover damages. The Tribunal also found that Lissom Earth Sciences established that it would suffer some irreparable harm, mainly to its reputation as a firm that provides environmental services.

For the balance of convenience, the Tribunal found that if the stay were granted, the RAP would not be completed until late in 2009. Also, the clean-up of the Site would not occur until some time after the RAP is completed. Therefore, the Tribunal found that there would be harm to the environment if the stay were granted because granting a stay would delay the clean-up of the Site. There was evidence to suggest that spring thaw would result in more leachate entering the soil.

The Tribunal, therefore, refused the Motion for a stay of the Order.

Order Released: November 6, 2008 (Case Nos.: 08-038, 08-046 and 08-050)

Ultramar Ltée/Ultramar Ltd. v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Ultramar Ltée/Ultramar Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding work in relation to the contamination of drinking water systems as a result

of the discharge of hydrocarbons from the Appellant's gas station in the Township of Clearview, Ontario (the "Site").

This particular Tribunal Order provided reasons for the Tribunal's Order of October 1, 2008 dismissing a Motion brought by the Appellant seeking the revocation of the Director's Order.

The Tribunal found that pursuant to Environmental Appeal Board case law, *Caltrex Petroleum Inc. v. Ontario (Ministry of Environment and Energy)*, [1994] O.E.A.B. No. 53 (QL) and *Colonia Life Insurance Co. v. York (Regional Municipality) Environment Services Department*, [1995] O.E.A.B. No. 64 (QL), the Tribunal should only grant a Motion for revocation in the clearest of cases and only where there is truly no genuine issue to be determined on appeal. The Tribunal also found that on a preliminary Motion to dismiss a proceeding, the Tribunal should not assume the role of a Hearing Panel by adjudicating factual issues.

In the present proceeding, the Tribunal found that it was not clear how, when, and under what circumstances the hydrocarbons were discharged into the water within the Site. Also, there was a dispute as to whether the Appellant exercised "management or control" of a certain undertaking. Therefore, there were clear, genuine issues to be considered on appeal.

Accordingly, the Tribunal dismissed the Appellant's Motion.

Order Released: November 17, 2008 (Case Nos.: 07-127 to 07-134)

Braun v. Director, Ministry of the Environment (Order)

Pursuant to section 140 of the *Environmental Protection Act*, Robert C. Braun, Lissom Earth Sciences ("Lissom"), and Cascades Canada Inc. ("Cascades") (the "Appellants ') appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding deposits of sludge material and contamination of a site in the County of Oxford, Ontario (the "Site"). The focus of this Order was on the production of a Remedial Action Plan ("RAP") for sludge that was deposited at the Site. During the Preliminary Hearing teleconference, Michelle Couse, owner of the Site, was added as a Presenter to this proceeding. Ms. Couse noted that her interests in this proceeding stem from her ownership of the land and her desire to explain the circumstances involved in the deposit of the material at the Site.

Two of the Appellants, Lissom and Cascades, filed Notices of Allegation under the Tribunal's Rules of Practice against Ronald Stanley Charlton – a former employee of Lissom. Lissom and Cascades submit that the responsibility for the work ordered should be directed to Mr. Charlton either independently or together with Mr. Braun, Ms. Couse, or Mr. Couse. At the Preliminary Hearing, Lissom and Cascades notified the Tribunal that they were unable to locate Mr. Charlton to serve him with the Notices of Allegation. Lissom and Cascades further notified the Tribunal that they will likely seek permission to introduce evidence regarding Mr. Charlton's involvement, in the event that they are unable to serve him with the Notices.

The Tribunal requested that the Parties be prepared at the Hearing to speak to the issue of the Tribunal's jurisdiction to name a third party to a Director's Order. In particular, the Tribunal requested the Parties to refer to relevant case law, including: *Dibblee Construction Ltd. v. Ontario (Ministry of the Environment and Energy)*, [1997] O.E.A.B. No. 36, *724597 Ontario Ltd., Re* (1994), 13 C.E.L.R. (N.S.) 257 (Ont. Env. App. Bd.) at 306-310, and *Canadian Occidental Petroleum Ltd. v. British Columbia (Ministry of Environment, Land and Parks)*, [2001] B.C.E.A. No. 9 (B.C. Env. App. Bd.).

Order Released: November 18, 2008 (Case Nos.: 08-038, 08-046 and 08-050)

City of Hamilton v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), the City of Hamilton (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to conditionally approve a Certificate of Approval Application ("CofA") made by the City of Hamilton for a landfill site located in Hamilton, Ontario.

At the Preliminary Hearing, the Parties notified the Tribunal that they were nearing a proposed settlement. On November 17, 2008, the Parties notified the Tribunal that had entered into Minutes of Settlement ("MoS"). The MoS allowed for a 2.5-meter increase in the height of the landfill. This amendment was reached taking into consideration the results of a public consultation process where it was found that the small increase in height was not a major concern to the community.

The Tribunal found that the MoS was consistent with the purposes of the *EPA* and was in the public interest. Accordingly, the Tribunal ordered the Director to amend the CofA to reflect the MoS, accepted the Appellant's withdrawal, and dismissed the appeal.

Decision Released: November 19, 2008 (Case No.: 08-022)

473702 Ontario Limited v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), 473702 Ontario Limited ("473702 Ltd.") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order requiring the removal of waste deposited at a site located in the Township of St. Clair, Ontario.

The Order in question was issued on March 12, 2008. On March 18, 2008, the Appellant sent a letter to the MOE asking the Director to "please reconsider our request for removal from these orders, or schedule a hearing that we may present our case for review." On March 27, 2008, several individuals filed a Notice of Appeal with the Environmental Review Tribunal ("Tribunal"), however 473702 Ltd. did not file a Notice of Appeal at that time. On June 23, 2008, the Preliminary Hearing in this matter was held, however, 473702 Ltd. did not seek to participate in the proceeding. On November 5, 2008, Counsel for 473702 Ltd. wrote to the Tribunal asking if the March 18, 2008 letter to the Director constituted an appeal of the Order. On November 10, 2008, Counsel for

473702 Ltd. wrote to the Tribunal requesting an extension of the 15-day statutory appeal deadline to allow 473702 Ltd. to appeal the Order.

The issue in this matter was whether the Tribunal should extend the 15-day filing deadline. After reviewing section 141 of the *EPA*, Counsel for 473702 Ltd. informed the Tribunal that he was abandoning his request for an extension of the time limit. The other Parties in the proceeding did not object to 473702 Ltd. abandoning its appeal.

Accordingly, the Tribunal ordered that 473702 Ltd.'s appeal in this matter be dismissed.

Decision Released: November 24, 2008 (Case No.: 08-116)

James Dick Construction Limited v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act*, James Dick Construction Limited (the "Appellant") appealed the decision of the Director, Ministry of the Environment to issue a Certificate of Approval (Air) ("CofA") to the Appellant regarding one portable concrete batching plant.

The main concern of the Appellant was a condition in the CofA limiting the operation of the portable plant to sixty calendar days at any one site. On October 31, 2008, the Parties participated in Tribunal-assisted mediation. During the mediation, the Director advised the Tribunal that if the Appellant needed to operate the portable facility at any one site for more than sixty days, the Appellant could apply for a permanent, site-specific CofA on an expedited basis.

On November 10, 2008, the Appellant wrote to the Tribunal to formally advise that he wished to withdraw his appeal in light the Director's comments during mediation. As there were no amendments to the CofA, the Tribunal accepted the withdrawal of appeal.

Decision Released: November 24, 2008 (Case No.: 08-035)

Kawartha Dairy Limited v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), Kawartha Dairy Limited (the "Appellant") appealed the decision of the Director, Ministry of the Environment to issue an Order requiring the Appellant to develop a noise abatement plan. The main issue in the appeal was the compliance dates for achieving the various requirements in the Order.

On November 21, 2008, the Parties entered into Minutes of Settlement ("MoS"). The MoS requested that the Tribunal amend the compliance dates and also stipulated that the report referred to in Item 4 of the Order need only be submitted to persons who complain to either Party regarding the noise.

The Tribunal found that the amendments were procedural in nature and did not alter the substantive requirements of the Order. Therefore, the Tribunal found that the MoS were consistent with the

purposes and provisions of the *EPA* and in the public interest. Accordingly, the Tribunal ordered that the Order be amended to reflect the MoS, accepted the withdrawal, and dismissed the appeal.

Decision Released: November 27, 2008 (Case No.: 08-059)

Associated Industries Corp. v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), Associated Industries Corp. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to suspend the Appellant's Certificate of Approval (Waste Management) ("CofA").

A brief background of this case is as follows:
On May 13, 2008, Teishu Lootawon and Vishnu Lootawon (the "Lootawons"), amongst others, pleaded guilty to operating a waste management system without a license and failing to comply with a Director's Order by continuing to operate a waste management system without approval.

The Suspension Notice was sent to the Appellant by Ian Parrott, Director, MOE. It stated that the CofA was obtained through the provision of misinformation concerning the true corporate management of Associated Industries Corp. ("AIC"), that Deokallie Prasaud was not the sole person in charge of AIC, that the Lootawons were involved in the day-to-day operations of AIC, and that Ms. Prasaud and the Lootawons have previous environmental convictions. The notice further stated that the Director would consider lifting the suspension upon receipt of certain information. Further information was provided, but the suspension was not lifted.

Several months later, Sarah Paul, Director, MOE, issued a Revocation Notice of the CofA on essentially the same grounds that were relied upon in the Suspension Notice. She sent correspondence to the Appellant indicated that the additional information that was provided did nothing to alter her decision. The Director concluded that the Appellant continued to supply false and misleading information and that the continued operation of AIC was not in the public interest.

The issues before the Tribunal were as follows:

1. Whether a Suspension Notice and a Revocation Notice must be issued by the same Director.
2. What is the standard to be applied by the Tribunal in considering an appeal of a Director's decision that was made under section 39(2)(e) of the *EPA*.
3. Whether the Appellant's CofA should be revoked because it is probable that the operation of AIC's waste management system is not in the public interest.

Issue 1: The Tribunal found that the *EPA* clearly contemplates the appointment of more than one Director. Also, section 1(2) of the *EPA* states that: "the Director" means a Director appointed under section 5.

Issue 2: The Tribunal found that it could substitute its discretion for that of the Director's. Or, put another way, the Tribunal found that it stands in the shoes of the Director in deciding the

appropriate course of action. Therefore, it found that it must weigh the evidence in a manner that will determine whether it is probable that the operation of the Appellant's waste management system is not in the public interest.

Issue 3: The Tribunal found that when exercising its discretion "in the public interest", it is constrained by the purpose of the statute under which the discretionary powers lie. The Director raised two grounds for concluding that the Appellant's operations were not in the public interest. First, the Director submitted that it was likely that the Appellant's operations will not be compliant with environmental regulations because of the involvement of the Lootawons. Second, the Director submitted that the Appellant has provided inaccurate information to the MOE regarding the control and management of AIC.

With regard to the first ground, the Tribunal found that the evidence showed that Ms. Prasaud was not the sole person running AIC and that it is probable that one or both of the Lootawons were controlling AIC's operation. With regard to the second ground, the Tribunal found that Ms. Prasaud did provide false information to the MOE.

The Tribunal, therefore, dismissed the appeal and found that the revocation of the Appellant's CofA was an appropriate remedy.

Decision Released: December 5, 2008 (Case Nos.: 07-053 and 07-090)

Collingwood Ethanol GP Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act* ("*EPA*"), Collingwood Ethanol GP Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue two Orders regarding investigating and ceasing certain activities that emit odours and noise and enhancing a complaints response procedure. The Orders related to an ethanol manufacturing plant in the Town of Collingwood, Ontario.

With regard to the first Order, the Appellant took issue with the requirement that the Appellant visit a complainant personally within sixty minutes after the receipt of a complaint. With regard to the second Order, the Appellant took issue with the filing deadline and also questioned whether the Director had the authority to issue a second Order.

On November 26, 2008, the Appellant sent correspondence to the Tribunal requesting to withdraw its appeals. No objections were received from the other Parties and Presenter. Accordingly, the Tribunal accepted the withdrawal of the appeals pursuant to Rule 191 of the Rules of Practice and Practice Directions of the Environmental Review Tribunal and dismissed the appeals.

Decision Released: December 16, 2008 (Case No.: 08-066 and 08-068)

AB Crushing Inc. v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act*, AB Crushing Inc. (the "Appellant") appealed the decision of the Director, Ministry of the Environment, to conditionally approve the Appellant's application for a Certificate of Approval (Air) ("CofA"). The CofA was related to the Appellant's integrated mobile recycler.

The Appellant's main concern with the CofA was with regard to two conditions. One condition limited the Appellant's operation on any one particular site to 60 calendar days. The other condition was with regard to the use of wet dust suppression. The Appellant submitted that he needed the flexibility to stay at a site longer than 60 calendar days and that wet dust suppression was not always available.

After the Parties participated in mediation, the Appellant sought to withdraw his appeal pursuant to a settlement agreement. The settlement agreement amended the CofA so that the Appellant could operate without wet dust suppression so long as a setback of 120 metres was observed. The settlement agreement also shortened the length of the notification period required when the Appellant sought to relocate the mobile facility.

The Tribunal found that the settlement agreement was consistent with the purposes and provisions of the Act and was in the public interest. Accordingly, the Tribunal accepted the withdrawal, ordered the Director to issue the amended CofA as reflected in the settlement agreement, and dismissed the appeal.

Decision Released: January 10, 2009 (Case No.: 08-013)

Greentowne Environmental Inc. v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), Greentowne Environmental Inc. ("Appellant") appealed the decision of the Director, Ministry of the Environment to issue a Notice of Revocation with respect to the Appellant's Certificate of Approval (Waste Management System).

The Director issued a Notice of Revocation on the grounds that the waste management system operated by the Appellant was not in the public interest. According to the Director, the Notice of Revocation was delivered by mail on September 15, 2008 and, therefore, deemed to be served upon the Appellant on September 22, 2008. The Appellant claimed that he only received the notice on October 23, 2008 and filed an appeal on November 5, 2008. On November 23, 3008, the Appellant brought a Motion requesting that the Tribunal declare the Notice of Revocation invalid.

Under section 139(1) of the *EPA*, a Notice of Appeal must be filed with the Tribunal within 15 days after service of the Director's notice. The issues before the Tribunal, therefore, were whether the Notice of Appeal was filed within the statutory timeline and, if not, whether the Tribunal may extend the time for filing. On the first issue, the Tribunal found that the evidence supported the proposition that the Notice of Revocation was mailed on September 15, 2008 and, therefore, deemed

served on September 22, 2008 pursuant to section 182(2) of the Act. On the second issue, the Tribunal found that, pursuant to section 141 of the Act, it only had very limited authority to extend the deadline where it is demonstrated that the service of the decision did not give the person notice of the decision.

Accordingly, the Tribunal found that the Notice of Appeal was not filed within the statutory timeline and, therefore, dismissed the appeal for lack of jurisdiction.

Decision Released: January 21, 2009 (Case No.: 08-105)

Detox Environmental Ltd. v. Director, Ministry of the Environment (Order)

Pursuant to section 139 of the *Environmental Protection Act* ("*EPA*"), Detox Environmental Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment, to conditionally approve the Appellant's application for a Provisional Certificate of Approval (Waste Management System) ("CofA"). The CofA related to a waste management system for polychlorinated biphenyl. The Appellant appealed the portion of the CofA that required the Appellant to maintain $100,000 in financial assurance.

Pursuant to the Tribunal Rules of Practice, the Tribunal Case Manager sent correspondence to the Appellant informing the Appellant that it was required to provide a list of names and addresses of all owners of property within 120 metres of the boundary of the property that is the subject of the Director's decision. The Appellant responded to the Tribunal by stating that its operations are not site specific as they involve the transportation of waste from various generators to various licensed receivers. Accordingly, the Appellant submitted that there was no property that was the subject of the dispute and the Appellant should, therefore, not have to fulfill this requirement.

The Tribunal found that the purpose of giving notice to owners within 120 metres was to notify potentially interested persons that a public hearing would be taking place so that public participation could be fostered. Accordingly, there must be good reason for the Tribunal to depart from the notice requirement.

The Tribunal found that the Appellant's request to wave the notice requirement would not serve the public interest objectives of the *EPA* and the Tribunal Rules. Accordingly, the Tribunal ordered the Appellant to provide a list of names and addresses of all owners of property within 120 metres of the Appellant's truck storage yard in Bowmanville, Ontario.

Order Released: February 9, 2009 (Case No.: 08-155)

Rich Products of Canada Limited v. Director, Ministry of the Environment (Decision)

Pursuant to section 139 of the *Environmental Protection Act*, Rich Products Canada Limited (the "Appellant") appealed the decision of the Director, Ministry of the Environment to conditionally approve a Certificate of Approval (Air) application made by the Appellant. The CofA related to a bakery located in the Regional Municipality of Niagara, Ontario.

The Appellant appealed the portion of the CofA that related to the implementation of a Noise Abatement Action Plan ("NAAP"). The Appellant submitted that it intended to undergo renovations at its bakery and that these renovations would further the implementation of the NAAP. As such, the Appellant sought to have the implementation dates in the CofA changed. Pursuant to Tribunal-assisted mediation, the Parties entered into an agreement that requested the Tribunal to make changes to the compliance dates, remove the Director's reasons for imposing certain Items, and dismiss the Appellant's claim for an award of costs.

The Tribunal found that the settlement agreement was consistent with the provisions of the Act and was in the public interest. Accordingly, the Tribunal accepted the withdrawal of the appeal, amended the CofA to reflect the settlement agreement, and dismissed the appeal.

Decision Released: February 24, 2009 (Case No.: 08-096)

Inter-Recycling Systems Inc. v. Director, Ministry of the Environment (Order)

Pursuant to section 139 of the *Environmental Protection Act*, Inter-Recycling Systems Inc. (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to amend the Appellant's Provisional Certificate of Approval (Waste Disposal Site) ("CofA"). The CofA related to a waste disposal site located in the County of Lambton, Ontario.

The background to the matter is as follows. On June 17, 2004, the *Adams Mine Lake Act* (the "*AMLA*") was enacted. The *AMLA* prohibits the deposit of waste water into a "lake", a defined term. By letter dated December 22, 2004, the MOE requested that the Appellant either resubmit a Design and Operations Plan showing that landfilling operations would not occur in any part of the site defined as "lake" under the *AMLA*, or that they prepare and submit a Closure Plan for the site. On October 24, 2007, the Director issued an Order requiring the Appellant to, amongst other things, submit a revised Design and Operations Plan or a Closure Plan for the Site. On November 7, 2007, the Appellant filed an appeal with respect to this Director's Order. That appeal was dismissed by the Tribunal, pursuant to a Motion to Dismiss brought by the MOE, on the basis that the Appellant had not raised a genuine issue for a Hearing. In the interim, the Appellant and the MOE had reached an agreement regarding the issues surrounding the Site. Pursuant to that agreement, the Director amended the CofA.

The amended CofA was the subject of the current proceeding. The Appellant submitted that the Director did not have the jurisdiction to amend the CofA and that it was premature to require a Closure Plan for the Site because there were areas on the site that could still be subjected to landfilling. In response, the MOE brought another Motion to Dismiss on the basis that the new appeal was frivolous and vexatious. The MOE noted that in the time since the Tribunal granted the original Motion to Dismiss on November 7, 2007, the facts had not changed. In addition, the MOE stated that this was the second appeal by the Appellant and, as such, it was an improper and vexatious attempt to attack or circumvent duly enacted legislation.

The Tribunal noted that, pursuant to Rule 102 (a), the test was whether the appeal was frivolous, vexatious, or commenced in bad faith. In applying this test, the Tribunal found that it must start with the plain language in the Rule. The Tribunal noted, however, that from a practical point of view, the subtleties between "frivolous" and "no genuine issue for trial" are minimal.

After applying Rule 102 (a), the Tribunal found that the Motion to Dismiss pertaining to the Director's jurisdiction to amend the CofA ought to be granted. This finding was supported by the fact that the Appellant confirmed that an agreement had been reached with the Director and the agreement was the basis of the CofA amendment. However, the Tribunal found that the Motion to Dismiss pertaining to the Closure Plan for the Site ought not be granted. The basis of this finding was supported by the fact that the parameters of the *AMLA* were a matter of interpretation and had not yet been fully argued before the Tribunal. Accordingly, the Tribunal found it was impossible to assess the merits of this issue without a hearing.

The Tribunal granted the Motion to Dismiss in part, and scheduled the Preliminary Hearing to continue for the purpose of setting dates for the Hearing.

Order Released: February 24, 2009 (Case No.: 08-065)

Ultramar Ltée/Ultramar Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act*, Ultramar Ltée/Ultramar Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment, to issue Orders regarding work in relation to the contamination of drinking water systems as the result of a discharge of hydrocarbons from the Appellant's gas station in the County of Simcoe, Ontario.

On October 2, 2008, Tribunal-assisted mediation began. After several months of negotiations, the Parties entered into a Settlement Agreement (the "Agreement"). The Agreement provided for the revocation of the Director's Orders and their replacement by an Order of the Tribunal. The Agreement stipulated, amongst other things, that the Appellant would conduct sampling and monitoring, continue to provide potable water to certain individuals, and would install sediment fillers in the drinking water systems of other individuals.

The Tribunal found that the Agreement was consistent with the purposes and provisions of the Act, was in the public interest, and, therefore, issued a Decision reflecting the agreed upon terms and dismissing the Appeal.

Decision Released: February 25, 2009 (Case Nos.: 07-127 to 07-134)

Agraso v. The Corporation of the City of Pickering (Decision)

Pursuant to section 100.1 of the *Environmental Protection Act*, Ann Antonia Agraso and Ricardo Agraso (the "Appellants") appealed the decision of the City of Pickering (the "City") to issue an Order to Pay Costs (the "Order"). The Order was regarding a clean-up performed by the City relating to an oil spill in the City of Pickering, Ontario.

The Parties had reached an agreement in this matter before the main Hearing. The agreement stated that the Appellants agreed to pay $5,000 within 60 days of January 13, 2009.

Given that the clean-up was already performed and the agreement reflected a settlement reached by the Parties, the Tribunal found that the agreement was consistent with the provisions of the Act and in the public interest. The Tribunal, therefore, accepted the withdrawal and dismissed the appeals.

Decision Released: February 26, 2009 (Case Nos.: 07-154 and 07-155)

General Chemical Industrial Products Inc. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act*, General Chemical Industrial Products Inc., General Chemical Canada Holding Inc., De Lyle W. Bloomquist, H. Scott Ellis, Eugene I. Davis, David Graziosi, Derek L. Rogers, Bliss A. White, and Jillian Swartz (the "Appellants") appealed the decision of the Director, Ministry of the Environment to issue Orders regarding a waste disposal site, known as the soda ash settling basin, located in the Town of Amherstburg, Ontario.

On October 31, 2008, the Parties provided Minutes of Settlement ("MoS") to the Tribunal. Under the MoS, the Parties agreed that the Appellants would pay an additional $17 million as a financial assurance, and there would be moneys to address monitoring, reporting, and insurance requirements and other additional conditions agreed to by the Parties such as the registration of Certificates of Requirement and the execution of certain releases. In return, the MoS stipulated that the Appellants were released from any claim by the Province of Ontario and the Town of Amherstburg for further compensation arising from the Site.

The Tribunal found the MoS to be consistent with the purposes and provisions of the Act, in the public interest, and, therefore, issued a Decision reflecting the agreed upon terms and dismissing the Appeal.

Decision Released: March 3, 2009 (Case Nos.: 05-122 to 05-130 and 06-216 to 06-224)

General Chemical Canada Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act*, General Chemical Canada Ltd. (the "Appellant") appealed the decision of the Director, Ministry of the Environment, to amend an Order regarding the General Chemical Plant Facility, located in the Town of Amherstburg, Ontario.

This proceeding was related to the other General Chemical Canada Ltd. proceeding (decision released March 3, 2009). In this proceeding, the Parties entered into Minutes of Settlement ("MoS"). The MoS were conditional upon the Tribunal approving the MoS in the other General Chemical Canada Ltd. proceeding, which was done on March 3, 2009. The MoS in this proceeding allowed for the Province of Ontario to access the financial assurance created in the other MoS in order to fund remediation measures for the Site.

The Tribunal found the MoS to be consistent with the purposes and provisions of the Act, in the public interest, and, therefore, issued a Decision reflecting the agreed upon terms and dismissing the Appeal.

Decision Released: March 3, 2009 (Case No.: 07-122)

Davey-Linklater Funeral Home Ltd. v. Director, Ministry of the Environment (Decision)

Pursuant to section 140 of the *Environmental Protection Act*, Davey-Linklater Funeral home Ltd. (the "Appellant"), appealed the decision of the Director, Ministry of the Environment, to issue an Order regarding spillage of furnace oil from an underground tank on the Appellant's property in the Country of Bruce, Ontario.

On July 11, 2008, the Parties informed the Tribunal that settlement discussions were in progress. Shortly afterwards, a Settlement Agreement (the "Agreement") was produced. The Agreement stipulated that the Director would withdraw the Order and the Appellant would withdraw the Appeal. The Agreement further provided that the Appellant would drill a test hole in the southwest corner of the Site. If the samples showed that there were no detectible petroleum hydrocarbon concentrations, then no further action would be required. However, if there were detectible levels, then the Appellant would be required to install a monitoring well at the location.

The Tribunal found the Agreement to be consistent with the purposes and provisions of the Act, in the public interest, and, therefore, issued a Decision reflecting the agreed upon terms and dismissing the Appeal.

Decision Released: March 11, 2009 (Case No.: 06-198)

Niagara Escarpment Planning and Development Act

Poulton v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Joan Poulton ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Hockley Valley Ski Resort ("Applicant"). The Permit would allow the Applicant to remove accumulated silt/sediment from an existing pond located on property in the Town of Mono, County of Dufferin (the "Site") and to deposit the silt in a field, currently used for overflow vehicle parking, located elsewhere on the Applicant's property directly adjacent to the Appellant's property. The pond was used for aesthetic purposes as well as to supply water for irrigation and snow-making systems.

The Appellant opposed the Permit on the grounds that it could alter surface water run-off to her property and would be visually unattractive. At the Pre-Hearing Conference, the Applicant indicated that it would use an alternative location for the silt deposit, and the Appellant advised that

she agreed to withdraw her appeal provided that she received assurance that the Applicant would, in fact, carry out the proposed change to the Permit. Michael Baran, Planner for the NEC, and the Applicant amended the site plan referenced in Condition 5 of the Permit to reflect the change and the Appellant confirmed that she was withdrawing her appeal.

The Hearing Officers determined that the NEC's decision to conditionally approve the Permit was confirmed pursuant to section 25(10.2) of the *NEPDA*.

Decision released: April 21, 2008 (Case No.: 07-138)

Corbin v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Cheryl and Mark Corbin, and Ritch and Diane Ford ("Appellants"), appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Christian Dombkowski (the "Applicant"). The Permit was for the construction of a one storey accessory building with hydro service for the storage of hay and farm equipment on an existing lot in the City of Burlington (the "Site"). The Appellants were concerned that the proposed storage building would be used for commercial purposes, and in a manner that would be out of keeping with the rural character of the area.

Following a teleconference and a Site visit, the Parties informed the Hearing Officer that they had resolved the appeals through a mutually agreeable amendment to Conditions of Approval attached to the Permit. The issue before the Hearing Officer, therefore, was whether the NEC's decision to conditionally approve the Permit, with a revised condition agreeable to the Parties, was correct and should not be changed.

The Hearing Officer found that the Permit, with a revised Condition 8 requiring the Applicant to install a wooden fence, was agreeable to all the Parties. Accordingly, the Hearing Officer found that the NEC's decision to conditionally approve the Permit with the revised conditions of approval was correct, and pursuant to section 25(12.1) of the *NEPDA*, the NEC's decision was confirmed.

Decision released: May 15, 2008 (Case Nos.: 07-144 to 07-147)

Parrat v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Bruce Parrat ("Appellant") appealed a decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Tony Da Silva ("Applicant"). The Permit allowed the Applicant to construct a two-storey, 427 sq m to 557 sq m single dwelling, with an attached garage, 28 sq m cabana, swimming pool, patio, septic system, and new driveway on an existing lot located in the City of Burlington.

At a Pre-Hearing Conference, Ron Parent was added as a Party, Jill Parratt was added as a Participant, and Gilbert Jayne was added as a Presenter. The Appellant, added Party, Participant

and Presenter all expressed concerns about the size, design and footprint of the proposed residence, as well as water drainage issues. Before the Hearing, the Parties provided the Niagara Escarpment Hearing Office with the wording of two new Conditions of Approval, which if added to the existing Conditions of Approval, would resolve the appeal pursuant to an agreement reached by all Parties.

The Hearing Officer considered the proposed changes to the Conditions of Approval, and pursuant to section 25(12.1) of the *NEPDA*, confirmed the Permit with additional Conditions of Approval.

Decision released: May 13, 2008 (Case No.: 07-139)

Wilson v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Kim Wilson and Catherine Wilson (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Dufferin Aggregates (the "Applicant"). The Permit was for the relocation of a temporary radio tower within the Applicant's Quarry lands located in the Town of Milton and Halton Hills (the "Site").

Prior to the Hearing, the Parties entered into a Minutes of Settlement ("MoS"). The MoS required that the towers be located within the Quarry land, but further away from the Appellants' property. The issue before the Hearing Officer, therefore, was whether the NEC's decision to conditionally approve the Permit with the revised conditions was correct and should not be changed.

The Hearing Officer found the Permit with the revised conditions was agreeable to all Parties and did not adversely affect any other interested party. Accordingly, the Hearing Officer found the NEC's decision to conditionally approve the Permit with the revised Conditions of Approval to be correct and confirmed the decision pursuant to section 25(12.1) of the *NEPDA*.

Decision released: June 18, 2008 (Case Nos.: 07-142 and 07-143)

Goodhue v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), David and Marion Goodhue, Coalition of the Niagara Escarpment, Susan and Paul Philp, Dale Norton, and V. Anne Caswell (the "Appellants"), appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application ("the Permit") made by the Howell Family Pumpkin Farm ("the Applicant"). The Permit was for the allowance of a designated area to be used as a seasonal outdoor Lasertag game in the City of Thorold ("the Site"). The Site is designated as "Agricultural" in the City of Thorold Official Plan, and "Escarpment Protected Area/Good General Agriculture Area" and "Escarpment Natural Area/Environmental Protection Area" in the Region of Niagara's Regional Policy Plan. In addition, a wooded portion of the Site has been identified as an Area of Natural and Scientific Interest ("ANSI") by the Ministry of Natural Resources. The Appellants were concerned that the proposed allowable use in the

designated area would be an intensive recreational use and, therefore, that the NEC's decision was not made in accordance with the Niagara Escarpment Plan ("NEP").

The Applicant submitted that his decision to start the Lasertag enterprise was a result of the downturn he was experiencing in his pumpkin business. The Applicant submitted that the downturn in his pumpkin business was due largely to rainy weather conditions in the fall months, a time when he opens his farm for the annual pumpkin festival, and an increase in the amount of deer resulting in significant amounts of grazing damage. The Applicant submitted that the Lasertag enterprise would not cause damage to the ecological integrity of the area because he would not have to build any additional structures, he would rotate the playing fields so that each area would only be used one week per month, and he would fence off the white wood aster, a sensitive plants in that area. In addition, the Applicant submitted that the ANSI was currently at a low quality state due to the abundance of deer and the widespread invasion of garlic mustard.

The Hearing Officers found that Lasertag is not an accessory use to agriculture and, therefore, not a permitted recreational use in the Escarpment Protected Area of the Site. Also, they found that Lasertag is an intensive recreational activity and as such not permitted in the Escarpment Natural Area of the Site. Accordingly, the Hearing Officers found the NEC's decision to issue the Permit to be not in accordance with the NEP. As such, the Hearing Officers declined to confirm the NEC's decision and recommended to the Minister of Natural Resources that the Permit be denied.

The Minister issued a decision on June 19, 2008 not concurring with the recommendations of the Hearing Officers and directing the NEC to issue a Development Permit with the original conditions.

Decision released: Hearing Officers' Report dated January 9, 2007 released with Minister's Decision on June 19, 2008. (Case Nos.: 06-053 to 06-058 and 06-089)

Renchko and Hunter v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Mike and Bev Renchko, and Alton Hunter (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to refuse three Development Permit applications (collectively the "Permits", individually the "Permit") made separately by the Appellants. Two of the Permits, applied for by Mike and Bev Renchko, were for the construction of a marine railway and a floating dock for boat launching and docking purposes, and for the construction of a one storey dwelling, shed, hobby sugar shack, private sewage disposal system, and driveway within Hunter's Point Subdivision, Lot 4, Municipality of Northern Bruce Peninsula, Bruce County, Ontario ("Lot 4"). The other Permit, applied for by Alton Hunter, was for the construction of a two storey dwelling, private sewage disposal system, and driveway within Hunter's Point Subdivision, Lot 8, Municipality of Northern Bruce Peninsula, Bruce County, Ontario ("Lot 8"). Though the Permits were applied for separately, the Hearing Officers heard the appeals together because the evidence and submissions in regard to the appeals were often interwoven. The Hearing Officers advised the Parties that there would be only one written decision addressing all three appeals.

In 1977, the Ministry of Housing approved Alton Hunter's Draft Plan of Subdivision for 36 lots for Hunter's Point Subdivision and the NEC did not object. In 1987, the subdivision lots were registered. In 1989, there was the initial discovery of archaeological resources on Hunter's Point. In 1997-1998, there was the discovery of burial sites in the southern sections of the proposed subdivision. In 1999, the Registrar of Cemeteries issued a Declaration that the land containing the burials is an "Unapproved Aboriginal Peoples Cemetery" as defined in the *Cemeteries Act*. In 2002, two separate Development Permit applications were made by Troy Hunter and Mike Noble for Lots 21 and 1 respectively. Both Development Permits were approved on the condition that an on-site archaeological assessment be undertaken. Neither Troy Hunter nor Mike Noble appealed the condition and the Development Permits were subsequently issued. In 2004, after an archaeological assessment, the Ministry of Culture issued a clearance for development of Lots 1 to 8 and 21. In 2004 and 2005, Robert Freestone and Mike Renchko applied for Development Permits for Lots 8 and 4 respectively. In 2005, Rick Watt, NEC Planner, recommended approval of Lot 8. Later in 2005, the NEC refused the Development Permit applications for Lots 4 and 8. In 2007, after negotiations with Alton Hunter and the Chippewas of Nawash, the Province of Ontario purchased Lots 9-20 of Hunter's Point Subdivision.

The issues in this proceeding were as follows:

1. Whether allegations of reasonable apprehension of bias, breaches of natural justice, procedural fairness, and failure to give reasons, if proved, render the NEC decision incorrect.
2. Whether the NEC and the Hearing Officers must defer to the NEC Planner or to government regulatory agencies such as the Ministry of Culture and whether earlier NEC decisions regarding Lots 1 and 21 are binding.
3. Whether the oral history of the Chippewas of Nawash is admissible as evidence.
4. Whether the Permits in relations to Lots 4 and 8 are in accordance with the *NEPDA* and the Niagara Escarpment Plan ("NEP").
    a. Whether Part 1.8, Objectives 1 and 6 and Development Objective 4, and Part 2.13(1) of the NEP can be relied on in dealing with the Permits.
    b. Whether the term "cultural" includes spiritual considerations under the *NEPDA* and the NEP.
    c. Whether the proposed garage, hobby sugar shack, marine railway and floating dock are Permitted Uses under the Escarpment Recreation Area designated under the NEP.
    d. Whether the Permits for dwellings on Lots 4 and 8 are in accordance with the relevant Development Criteria and Objectives of the NEP.
    e. Whether the Permit for a marine railway and floating dock on Lot 4 is in accordance with the relevant Development Criteria and Objectives of the NEP.

The findings on the issues were as follows:

1. The Hearing Officers found that the Hearing process for appealing NEC decisions can cure any alleged breaches of natural justice or procedural fairness by virtue of it being a hearing *de novo*. If there were any breaches by the NEC that any Party believed could not be cured by the Hearing process, then the appropriate remedy would be a judicial review of the NEC's decision.

2. The *NEPDA* gives clear authority to the NEC to accept or reject the NEC Planner's advice. In addition, advice received by government regulatory agencies is merely advice and need not be followed. The NEC alone is the decision-maker. As for the previous decisions regarding Lots 1 and 21, the NEC is not fettered by these previous decisions. The NEC is permitted to consider the cumulative effect of development and there is now new evidence before the NEC because of the archaeological assessments that were completed.
3. The Hearing Officers found that the oral history of the Chippewas of Nawash was admissible as evidence pursuant to section 15(1) of the *Statutory Powers Procedures Act*. However, following Supreme Court of Canada case-law in *Delgamuukw v. British Columbia*, [1977] 3 S.C.R. 1010 , *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, and *R. v. Van der Peet* (1996), 137 D.L.R. (4th) 289 (S.C.C.), the Hearing Officers found that the oral history must be weighed, just like any other evidence put before them, but be given equal and due treatment.
4. Whether the Permits in relation to Lots 4 and 8 are in accordance with the *NEPDA* and the NEP:
    a. The Hearing Officers found that the overall Objectives of the NEP could be taken into account by the NEC and subsequently by the Hearing Officers when they are deciding whether the NEC decision should be upheld. In particular, the Hearing Officers found that Part 1.8, Objectives 1 and 6 and Development Objective 4 and Part 2.13, Criterion 1 are all valid sections for the NEC to consider and subsequently to be considered by the Hearing Officers when deciding whether the NEC decisions should be upheld.
    b. The Hearing Officers noted that the word "cultural" itself is not defined in the NEP but the word must be read in the context of the *NEPDA* and the NEP. The Hearing Officers found that the word "culture" in the NEP is linked to human-made manifestations of cultural activity. However, though "culture" is linked to human-made manifestations of cultural activity, there can be a spiritual or sacred aspect and, therefore, spiritual aspects or sacredness can be taken into account in the decision-making process. The Hearing Officers found that human-made cultural features that have a spiritual aspect are no less culturally valuable.
    c. The Hearing Officers noted that Part 1.8 of the NEP, which lists Permitted Uses for the Escarpment Recreation Area designation, does not include accessory buildings; however they found that this was merely an oversight. The Hearing Officers also found that the NEC, and thus the Niagara Escarpment Hearing Office ("NEHO") had jurisdiction over marine railways and docks as the NEC has jurisdiction over any building structure or facility that emanates from, and is connected to, a land-based structure or facility that is within the NEP boundary and development control. In addition, the Hearing Officers found that marine railways and docks, as general propositions, meet the definition of "accessory building and/or structures" in the NEP.
    d. Whether the Permits for dwellings on Lots 4 and 8 are in accordance with the relevant Development Criteria and Objectives of the NEP.
        i. Lot 8: The Hearing Officers found that the southern part of the subdivision is an important cultural heritage feature that must be protected and that it is highly unlikely that there are burials in the northern part of the subdivision,

including Lots 4 and 8. Though the Hearing Officers found that Lot 8 did not contain burial grounds, the Hearing Officers found that Lot 8 is only ten metres north of Location 6, which has cultural and ceremonial importance to the Chippewas of Nawash. As such, cottage life on Lot 8 and aboriginal ceremonies are not compatible uses when there is only a separation of ten metres. In addition, a residential dwelling on Lot 8 would result in increased pedestrian and vehicular traffic in close proximity to Lot 9, which has cultural significance. The Hearing Officers found, therefore, that the decision of the NEC to refuse the Permit for Lot 8 was correct and confirmed the decision.

ii. Lot 4: The Hearing Officers found that neither a "serious detrimental effect" nor a "substantial negative impact" would occur with a dwelling on Lot 4. Therefore, the Hearing Officers found that the decision of the NEC to refuse Development Permit for Lot 4 was not correct and recommended to the Minister of Natural Resources to issue the conditional Permit. The Hearing Officers also recommended the proposed condition that all buildings and construction equipment stay parked in Lot 4 except for purposes of traveling to and from the Lot.

e. The Hearing Officers noted that there were no visible structures, including marine railways and docks, in the Hunter's Point area and that the area was virtually pristine. The unspoiled nature of this area was an integral part of the natural, aesthetic, and visual character of the Niagara Escarpment and as a result the construction of a marine railway detract from the natural and unspoiled features of the landscape and shoreline. As such, the Hearing Officers found the decision of the NEC to refuse a Development Permit for the marine railway and dock to be correct and confirmed.

In closing, the Hearing Officers noted the importance of considering the development near the "site proper" and to recognize the cumulative impacts that could result from development. As such, the Hearing Officers recommended to the relevant Ministries to develop a strategy to address how much future development should take place in the Hunter's Point subdivision. Also, the Hearing Officer's recommended that the NEC defer consideration of any Development Permit until a plan for the protection and management of Lots 9 to 20 is complete.

In summary, the Hearing Officers confirmed the decision of the NEC to refuse Permits for Lot 8 and to refuse a Permit for a marine railway and dock on Lot 4, but did not confirm the decision of the NEC to refuse a Permit for Lot 4.

The Minister issued a decision on August 7, 2008 concurring with the recommendation of the Hearing Officers and directing the NEC to issue a Development Permit for Lot 4 subject to the additional and revised conditions.

Decision released: Hearing Officers' Report dated October 19, 2007 released with Minister's Decision on August 7, 2008 (Case Nos.: 05-094 to 05-097)

Bergsma Trucking v. Niagara Escarpment Commission (Decision)

Pursuant to section 25 (8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Bergsma Trucking (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to refuse the Development Permit application (the "Permit") made by the Appellant. The Permit was for outdoor storage facilities for recreational vehicles, sand, gravel, and salt on lands located at Henderson's Corner, Ontario (the "Site").

The NEC refused the Permit on the basis that it did not conform to the Town of Halton Hills Official Plan ("Official Plan"). During the Pre-Hearing Conference, the Appellant advised the Hearing Officer that he recently came to understand that the NEC did not have jurisdiction to issue him the Permit because the jurisdiction of the NEC is overridden by the Official Plan. Accordingly, the Appellant advised that he wished to withdraw his appeal. As per section 25 (10.2) of the *NEPDA*, where the Appellant withdraws their appeal, the decision of the delegate shall be deemed to be confirmed. Accordingly, the Hearing Officer deemed the decision of the NEC to be confirmed.

Decision released: September 8, 2008 (Case No.: 08-002)

Budenas v. Niagara Escarpment Commission (Decision)

Pursuant to section 25 (8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Ronald Budenas and Sylvie Budenas (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve the Development Permit application (the "Permit") made by Alex Kozak (the "Applicant"). The Permit was to recognize the placement of a one-storey manufactured home for use as a single dwelling on an existing parcel of land within the Poltawa Country Club.

The Appellants appealed the decision because they objected to the establishment of any form of "trailer related buildings" to be used for any purpose within the Poltawa Country Club as trailer buildings reduce the value of neighbouring properties. During the Pre-Hearing Conference, the Parties agreed to discuss a settlement. Shortly thereafter, the Niagara Escarpment Hearing Office ("NEHO") received Minutes of Settlement (the "Agreement") acknowledging that the Parties reached an agreement. The Applicant agreed that the trailer will not have the appearance of a "trailer" or "mobile home".

As the Parties reached an agreement, the Appellants sought to withdraw their appeal. As per section 25 (10.2) of the *NEPDA*, where the Appellant withdraws their appeal, the decision of the delegate shall be deemed to be confirmed. Accordingly, the Hearing Officer deemed the decision of the NEC to be confirmed.

Decision released: September 5, 2008 (Case Nos.: 08-019 and 08-020)

Harold Sutherland Construction Ltd. v. Niagara Escarpment (Decision)

Pursuant to section 25 (8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Harold Sutherland Construction Ltd. (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to refuse the Appellant's Development Permit application (the "Permit"). The Appellant sought the Permit to reduce the established westerly setback boundary from 15 metres to 0 metres and to excavate additional aggregate material at an existing quarry located in Georgian Bluffs, Ontario (the "Site").

The Appellant established the Site with an approved Development Permit application in 1988. At the time, 30 metre excavation setbacks were established for the North and East boundaries and 15 metre excavation setbacks were established for the South and West boundaries. The Appellant recently purchased approximately 121 hectares of vacant land to the west of the Site in the Niagara Escarpment Natural and Rural Areas. When the NEC was reviewing a previous Development Permit application from the Appellant for an expansion of the Site, it was discovered that the Appellant had, in certain areas, excavated beyond the westerly licenced boundaries. Consequently, the Ministry of Natural Resources ("MNR") directed the Appellant to backfill the excavated lands to the licensed boundaries and apply for a Development Permit to allow for a reduction of the westerly boundary from 15 metres to 0 metres. The MNR advised that if the NEC did not approve the reduction of the westerly boundary, the Appellant would have to backfill the 15 metre setback as well. The NEC refused the Permit on the basis that the 0 metre setback is inconsistent with the setbacks established in the previous 1988 Permit.

The Hearing Officer found that the decision of the NEC to refuse the Permit was not correct. The Hearing Officer noted that the under the provisions of the Niagara Escarpment Plan ("NEP"), the character of the lands and how they are used are the guiding purposes. Although the NEC underscored the importance of adequate buffer zones to achieve this purpose, in the unique circumstances of this case, the northerly portion of the strip of property between the quarry and the road together with the remaining westerly area setback within the licensed area will be an adequate buffer for the quarry operations.

Accordingly, the Hearing Officer did not confirm the NEC's decision to refuse the Permit and recommended to the Minister of Natural Resources that the Permit be approved with the Recommended Conditions of Approval.

The Minister issued a decision on June 3, 2008 concurring with the recommendations of the Hearing Officer and directing the NEC to issue a Development Permit subject to the additional and revised conditions.

Decision Released: Hearing Officer's Report dated June 3, 2008 released with Minister's Decision on September 19, 2008 (Case No.: 07-106)

Darcie v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Jack Pemberton (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Halton Place. The Permit allowed for six equestrian hunter and jumper tournaments/events lasting five days at a time to take place over a period from July 1, 2008 to September 8, 2008 in the Town of Halton Hills, Ontario (the "Site").

In a preliminary Motion, Halton Place sought to dismiss the appeal on the basis that the issues raised were substantially the same as the issues before the Niagara Escarpment Hearing Office in *Pemberton v. NEC* (Case Nos.: 07-039 to 07-044 and 07-046 to 07-049) (August 10, 2007) and involved the same parties. Accordingly, Halton Place argued that the common law doctrines of *res judicata* and *issue estoppel* apply. The Hearing Officer found that the test for *res judicata* was not satisfied and that in any event the Hearing Officer has discretion on whether or not to allow the appeal. As for the issue of *issue estoppel*, the Hearing Officer found that the test for *issue estoppel* is the same as the test for *res judicata* which the Hearing Officer had already found was not satisfied.

As for the grounds of appeal, the Appellant submitted that the equestrian events were not a permitted use as an agricultural operation. Alternatively, they were not a permitted use as a small scale commercial use accessory to an agricultural operation. Finally, the noise generated by the events would interfere with the reasonable enjoyment by nearby owners of their properties. With regard to the first ground, the Hearing Officer found that the events, despite their scale, were still horse shows and, therefore, contribute to animal husbandry. The Hearing Officer found that the events encourage agricultural activities and are, therefore, consistent with the Niagara Escarpment Plan. As for the second ground, the Hearing Officer found it was unnecessary to consider because he already found the events to be an agricultural operation and, therefore, a permitted use. As for the third ground, the Hearing Officer found that the conditions in the Permit were sufficient to address the noise concerns.

The Hearing Officer found that the NEC decision was correct pursuant to section 25(12) of the *NEPDA* and should not be amended. Accordingly, the appeal was dismissed.

Decision released: October 3, 2008 (Case Nos.: 08-012 to 08-014).

Eaton v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Alan F. Eaton and Magaret Eaton-Kent (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit Application (the "Permit") made by the Regional Municipality of Peel for expansion of an existing in-ground water storage reservoir.

During a teleconference, the Parties advised the Hearing Officer that they anticipated they would resolve the outstanding issues prior to the Hearing. Shortly after, the Appellants advised in writing that their previous concerns with respect to the expansion of the reservoir had been dealt with and that they wished to withdraw their appeal.

Section 25(10.2) of the *NEPDA* states that if "the persons who appealed the decision withdraw their appeals or fail to appear at the hearing, the decision of the delegate shall be deemed to be confirmed." Accordingly, the Hearing Officer confirmed the decision of the NEC.

Decision Released: October 30, 2008 (Case Nos.: 08-061 and 08-062)

Integrated Municipal Services v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Integrated Municipal Services (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Mike Deprez to construct an eleven metre high cover-all structure to be used for the pre-processing and screening of waste and to construct an office building, all within an existing waste composting facility in the City of Thorold.

Following the release of the NEC decision, it became apparent to the Appellant and the NEC that Condition 12 conflicted with Condition 11 in the Conditions of Approval that are part of the Permit. At its meeting in October, 2008, the NEC approved a change to Condition 12 that would remove the conflict.

Section 25(12.1) of the *NEPDA* states that the decision of the NEC shall be deemed to be correct if the Parties agree on all the terms and conditions that should be included in a Permit and the Hearing Officer expresses the opinion that if the decision included the terms and conditions, the decision would be correct and should not be changed. Accordingly, the NEHO confirmed the decision of the NEC with the revised conditions of approval.

Decision released: November 12, 2008 (Case No.: 08-084)

Palmer v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Andy Palmer, Eileen Palmer, Nicholas Cooper, Helen Mearns, Elizabeth Vrooman, Marie Yakimoff, Paul Yakimoff, Robyn Mulroony, Ryan Shea, Kim Wilson, and Brock Wilson (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Donna Zmenak and Kevin Baker (the "Applicants") to establish a dog kennel business on an existing lot in the Town of Grimsy, Ontario (the "Site").

The main concerns of the Appellants were with regards to the potential for noise and odour. At the Pre-Hearing Conference, the Parties agreed to conduct a trial where the puppies would be brought

onto the Site for the purpose of assessing the noise impact on nearby residents. Shortly afterwards, the Appellants decided to withdraw their appeals.

Accordingly, the Hearing Officer accepted the withdrawal of the appeals and deemed the decision of the NEC to be correct.

Decision Released: November 27, 2008 (Case Nos.: 08-036, 08-037, 08-039 to 08-045, 08-047, and 08-048)

Fracassi v. Niagara Escarpment Commission (Order)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Allen Fracassi (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to refuse a Development Permit Application (the "Permit") made by the Appellant. The Permit was for the construction of a total of three single dwellings on three lots to be created, and retention of an existing single dwelling on a proposed remnant lot in the Town of Ancaster, Ontario.

On June 23, 2008, the Hearing Officer issued an Order granting the Appellant's request for an adjournment *sine die*. The purpose of the adjournment was to allow the Appellant to apply for a municipal Consent to Sever and Zoning By-Law Amendment. After the Appellant applied for these municipal approvals, the Appellant planned to file written notice with the Hearing Registrar so that all matters relating to the Appellant's proposal may be dealt with by a Joint Board under the *Consolidated Hearings Act* ("*CHA*"). A condition of the adjournment was that the Appellant contact the Niagara Escarpment Hearing Office ("NEHO") and provide a status report on the matter on August 1, 2008 if notice had not been served under the *CHA* by August 1, 2008.

On August 11, 2008, Counsel for the Appellant contacted the NEHO and indicated that the Appellant was experiencing delays in dealing with his municipal applications. Accordingly, Counsel asked for an extension on the reporting date. By Order dated August 19, 2008, the Hearing Officer issued an Order continuing the adjournment *sine die* and requiring the Appellant to provide a status report to the NEHO on November 10, 2008 if notice had not been served under the *CHA* by November 10, 2008.

On November 18, 2008, Counsel for the Appellant advised the NEHO that he had been unable to contact his client for instructions on this matter. Accordingly, Counsel informed the NEHO that his firm was no longer able to act for the Appellant on this file.

Rule 16 of the Rules of Practice and Practice Directions of the Environment Review Tribunal, which apply in development permit appeals under *NEPDA*, grants power to the Hearing Officer to issue procedural orders to ensure compliance when a Party or Participant is non-compliant. Rule 16 allows a Hearing Officer, after giving the Party or the Participant an opportunity to make submissions, to dismiss the proceeding or limit or revoke the person's participation rights.

In the present Order, the Hearing Officer issued a procedural Order to the Appellant requiring him to comply with the Hearing Officer's Order by filing a status report by December 8, 2008. The

Order indicated that the status report should indicate whether the Appellant has applied for the municipal applications and, if not, the reasons why and the next steps that will be taken. The Order further indicated that if the Appellant continued to not comply with the Orders, the Hearing Officer may, after giving him an opportunity to make submissions, consider dismissing the proceeding under Rule 16.

Order Released: November 28, 2008 (Case No.: 08-015)

Simmons v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Pamela Simmons (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Ferdo and Anica Derek (the "Applicants") to construct a single dwelling and an accessory building on an existing lot in the Town of Halton Hills, Ontario.

The Appellant appealed the decision of the NEC because the site plan indicated that the proposed driveway location was, in her opinion, located in swampy lands. This location would require the raising of the grade which, in turn, could possibly cause flooding in the Appellant's adjoining property. During the Pre-Hearing Conference, the Applicants advised the Hearing Officer that the site plan was obsolete and that the driveway would now be located further south. David Johnston, Planner with the NEC, further advised that a condition attached to the Permit required a grading plan to be submitted to the NEC.

When the Pre-Hearing Conference reconvened on October 15, 2008, the Parties advised the Hearing Officer that a revised site plan had been submitted that showed the driveway in the more southerly location. As the revised site plan was agreed to by all the Parties and dealt with the issue of potential run-off onto the Appellant's property, the Hearing Officer found that the NEC's decision to approve the Permit to include the revised site plan and conditions was correct and should not be changed. The appeal was, therefore, dismissed.

Decision released: December 3, 2008 (Case No.: 08-069)

Fracassi v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Allen Fracassi (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to refuse a Development Permit application (the "Permit") made by the Appellant. The Permit was for the construction of three single dwellings on a proposed remnant lot in the City of Hamilton, Ontario.

In a procedural Order issued November 28, 2008, the Hearing Officer required the Appellant to comply with a previous Order that required him to file a status report. The Order indicated that the status report should indicate whether the Appellant had applied for certain municipal applications and, if not, the reasons why and the next steps that will be taken. The Order further indicated that if

the Appellant continued to not comply with the Orders, the Hearing Officer may, after giving him an opportunity to make submissions, consider dismissing the proceeding under Rule 16 of the Rules of Practice.

No status report was file by the Appellant by the date specified in the Order. Accordingly, the NEHO sent correspondence to the Appellant to provide him the opportunity to make submissions on why the proceeding should not be dismissed. Again, no submissions were received from the Appellant by the date specified in the correspondence.

The Hearing Officer, therefore, dismissed the appeal pursuant to Rule 16.

Decision Released: January 9, 2009 (Case No.: 08-015)

Poole v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), Mary Anne Poole (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit Application (the "Permit") made by Gail Schmidt (the "Applicant"). The Permit was for the construction of a one-storey horse riding arena and hay storage building on an existing lot in the Town of Milton, Ontario.

The main concern of the Appellant was that equestrians exercising their horses and traversing the jumps would be able to see the Appellant on the pool deck in her yard. The Appellant felt that the Applicant should plant sufficiently sizable trees inside the Applicant's lot line to provide a screen to ensure the Appellant's privacy. In addition, the Appellant wanted the Applicant to clean up "discarded items" to improve the appearance of the Applicant's property and to plant additional trees and shrubs to block the Appellant's view of the arena.

During the Hearing, the Applicant agreed to remove the "discarded items" from her property to improve the aesthetics of her land. The Hearing Officer found that the Permit did not require the Applicant to install any visual barriers between the adjoining properties. In any event, the Hearing Officer found that the existing trees and structures provided adequate barriers. Finally, the Hearing Officer found that the use of land was compatible with the purposes of the *NEPDA*. Accordingly, the Hearing Officer confirmed the decision of the NEC.

Decision Released: January 27, 2009 (Case Nos.: 08-103 to 08-107)

Anstey v. Niagara Escarpment Commission (Decision)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act*, Carolyn Anstey and Keith Hesse (the "Appellants") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application ("Permit") made by Algirimo Postorivo ("Applicant"). The Permit was for the construction of a residence, septic system, driveway, and accessory building on a lot in the Town of Milton, Ontario.

The Appellants' concerns were with regard to the need for a site plan accurately showing the location of the residence and driveway. The Appellants were also concerned about tree retention, building plans, and visual impacts.

After the Pre-Hearing Conference, the Parties informed the Hearing Officer that they had reached a settlement agreement. The agreement added new conditions to the Permit that stipulated that the drainage associated with the driveway would be subject to review and approval by the NEC and the Town of Milton, and that the site plan shall preserve the trees and brush identified. As the Parties had reached a settlement agreement, the Appellants sought to withdraw their appeals.

Pursuant to section 25(12.1) of the *NEPDA*, the Hearing Officer found that the NEC's decision to conditionally approve the Permit, with the revised conditions agreed to by the Parties, was confirmed. The appeals, therefore, were dismissed.

Decision Released: February 19, 2009 (Case Nos.: 08-114 and 08-115)

Estate of Kate A. Wahl v. Niagara Escarpment Commission (Order)

Pursuant to section 25(8) of the *Niagara Escarpment Planning and Development Act* ("*NEPDA*"), the Estate of Kate A. Wahl (the "Appellant") appealed the decision of the Niagara Escarpment Commission ("NEC") to conditionally approve a Development Permit application (the "Permit") made by Craigleith Ski Club ("Craighleith"). The Permit was for the demolition of eight on-slope residential units and the restoration of the sites for use as part of a gladed ski trail in the Town of The Blue Mountains, Ontario.

The Appellant's Notice of Appeal sets out eight grounds of appeal: there was not timely notice of the NEC's hearing concerning this application, the NEC's decision is based on factual errors, the residential units to be demolished are not Craigleith's property, the proposal will cause drainage problems, Map 3 of the NEC's decision is inaccurate, Map 2B of the NEC's decision is inaccurate, a substantial number of tress will need to be removed to accommodate a gladed ski trail, and Craighleith is using the *NEPDA* process as a subterfuge in order to avoid its responsibility under landlord/tenant legislation. The subject of this particular Order was a Motion to Dismiss the appeal brought by Craigleith pursuant to section 25(8.1) of the *NEPDA*. Craighleith submitted that the Appellant is misusing the *NEPDA* process to attempt to extend the term of a lease upon the expiry of its fifty-year term. Therefore, the issue in this proceeding was whether the appeal did not disclose a planning justification, was not in the public interest, was without merit, or was frivolous or vexatious.

The Hearing Officer found that there was some overlap between the "no planning justification", "without merit", and "frivolous" aspects of section 25(8.1) and that these concepts have been discussed in previous Niagara Escarpment Hearing Office ("NEHO") decisions. However, the "not in the public interest" aspect has not been discussed in previous NEHO decisions and, therefore, was in need of interpretation. The Hearing Officer found that "public interest" should be interpreted in light of the purposes of the applicable legislation. In the case of *NEPDA*, the Hearing Officer found that the purpose of the Act was to "provide for the maintenance of the Niagara Escarpment and land

in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment." Accordingly, the Hearing Officer found that the public interest will be undertaken together with the closely related "no planning justification" analysis, given the central role that the Niagara Escarpment Plan plays in the determination of the appropriateness of development under the *NEPDA*. The Hearing Officer also found that there are other aspects of the public interest that could be considered on a Motion to dismiss. However, as submissions were not made in this proceeding, this issue should be left for future cases with detailed submissions.

The Hearing Officer found that the Appellant had raised valid substantive issues under the NEP in the sense that the issues raised regarded important environmental matters *vis-à-vis* the purpose of the *NEPDA* and the Objectives of the NEP. Also, based on the limited materials that were filed, the Hearing Officer found it was not possible to make a finding that the appeal was vexatious.

Accordingly, the Hearing Officer dismissed the Motion to Dismiss and set deadlines for the filing and serving of documents to be relied upon at the Hearing.

Order Released: March 26, 2009 (Case No.: 08-157)

Ontario Water Resources Act

Khan v. Director, Ministry of the Environment (Decision)

Pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), Waheed Ahmed Khan (the "Appellant") appealed the decision of the Ontario Environmental Training Consortium ("OETC") to refuse him a Class 1 wastewater treatment license. The OETC refused him a licence on the basis that Modatek Systems, his employer, was not a classified wastewater treatment subsystem, therefore, the experience gained by the Appellant while working at Modatek Systems could not count towards a Class 1 wastewater treatment license.

During the Preliminary Hearing, the Parties agreed to participate in mediation. As a result of mediation, the Ministry of the Environment ("MOE") agreed to accept the experience the Appellant obtained operating a sewage treatment facility system in Pakistan for the purposes of the Class 1 wastewater treatment licence. As an agreement was reached, the Appellant advised the Tribunal that he wished to withdraw his appeal.

The issue before the Tribunal, therefore, was whether the agreement was consistent with the purposes and provisions of the *OWRA* and whether the agreement was in the public interest. The Tribunal found that the agreement met this criterion as the MOE was satisfied that the Appellant was a qualified person for a Class 1 wastewater treatment license. As such, the Tribunal accepted the withdrawal and dismissed the appeal.

Decision Released: September 10, 2008 (Case No.: 07-123)

The Corporation of the City of Guelph v. Director, Ministry of the Environment (Decision)

Pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), the Corporation of the City of Guelph (the "Appellant") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue a Permit to Take Water ("PTTW") regarding the Smallfield well located in the City of Guelph, Ontario.

The PTTW was for a pumping test and for the purpose of conducting aquifer and treatability testing. Under the PTTW, the Appellant could only conduct tests and could not take water from the well for municipal water supply purposes. The Director's concern was the contaminant trichloroethylene.

After the Preliminary Hearing, the Parties advised the Tribunal that they would be engaging in settlement discussions. Afterwards, the Parties produced Minutes of Settlement ("MoS") that required rigorous water quality and quantity testing before the well could be used for municipal water supply. Because the Parties entered into MoS, the Appellant sought to withdraw its appeal.

To accept the withdrawal, the Tribunal had to find that the MoS were consistent with the *OWRA* and that the withdrawal was in the public interest. The Tribunal found the MoS met these criteria and, therefore, accepted the withdrawal and dismissed the appeal.

Decision Released: November 21, 2008 (Case No.: 08-027)

Brown v. Director, Ministry of the Environment (Decision)

Pursuant to section 100 of the *Ontario Water Resources Act* ("*OWRA*"), J. Edwin Brown, Ruth E. Brown, and J. Edwin Brown Holdings Incorporated (the "Appellants") appealed the decision of the Director, Ministry of the Environment ("MOE") to issue an Order regarding a sewage system for a mobile home park (the "Site"). The Order required that the Appellants retain a qualified person to test the existing septic tank and to confirm that any leaks have been repaired, or alternatively, to provide an opinion that the tank needed to be replaced. It further required that the point of discharge to the tile bed be blocked and that the Appellants provide confirmation that the tank will continue to be regularly emptied by a company or individual with an approved waste management system certificate of approval.

The Appellants appealed the Order on the basis that the septic tank was not faulty and the leaching bed was effectively accepting the inflow of sewage. The issue in this proceeding, therefore, was whether it was appropriate to require the Appellants to block the septic tank to "prevent the discharge of sewage into the environment."

In its evidence, the MOE submitted test results of samples taken from the Site. The results showed that there were elevated levels of E. Coli and Fecal Strep bacteria in the areas surrounding the sewage system. The Tribunal found that this evidence spoke for itself and that the Tribunal could not accept the Appellants' argument that the sewage system was not faulty.

Accordingly, the appeal was dismissed.

Decision Released: November 26, 2008 (Case Nos.: 07-170, 08-121 and 08-122)

The Regional Municipality of Waterloo v. Director, Ministry of the Environment (Decision)

Pursuant to section 100 of the *Ontario Water Resources Act*, The Regional Municipality of Waterloo (the "Appellant") appealed the decision of the Director, Ministry of the Environment to issue a Permit to Take Water ("PTTW") to the Appellant. The PTTW was for the purpose of water taking in the Regional Municipality of Waterloo, Ontario.

The Appellant took issue with a condition in the PTTW that incorrectly stated the Maximum Taken Per Day amounts. The Appellant also took issue with the monitoring condition on the ground, submitting that it was too vague with regard to reporting requirements.

At the Preliminary Hearing, the Parties presented the Tribunal with signed Minutes of Settlement ("MoS"). The MoS revised the Maximum Taken Per Day amounts and clarified the reporting requirements.

The Tribunal found that the MoS were consistent with the Act and in the public interest. Accordingly, the Tribunal amended the PTTW to reflect the MoS, accepted the withdrawal, and dismissed the appeal.

Decision Released: February 18, 2009 (Case No.: 08-112)

Safe Drinking Water Act

The Regional Municipality of Waterloo v. Director, Ministry of the Environment (Decision)

Pursuant to section 129 of the *Safe Drinking Water Act* ("*SDWA*"), the Regional Municipality of Waterloo (the "Appellant") appealed the decision of the Director, Ministry of the Environment, ("MOE") to issue an Amended Certificate of Approval, Municipal Drinking Water Systems ("CofA") to the Appellant. The CofA related to the additional monitoring and reporting of the Middleton Wells that are part of the Integrated Urban Water System of the Regional Municipality of Waterloo. In particular, the Appellant appealed Condition 8.1(c), requiring additional monitoring and reporting of the Middleton Wells.

Following a teleconference, the Parties informed the Tribunal that they proposed to resolve the appeal through a mutually agreeable amendment to Condition 8.1(c). The Parties sent the Minutes of Settlement (the "Settlement Agreement") to the Tribunal. The only issue before the Tribunal was whether the Settlement Agreement was consistent with the purpose and provisions of the *SDWA* and in the public interest.

The Tribunal found that the Settlement Agreement, with revised Condition 8.1(c) amending the reporting deadline and outlining a specific monitoring program, was agreeable to all the Parties and

did not adversely affect any other interested party. As such, the Tribunal found the Settlement Agreement to be consistent with the legislation and in the public interest. The appeal was, therefore, dismissed.

Decision released: July 18, 2008 (Case No.: 07-105)

Wilson v. Director, Ministry of the Environment (Decision)

Pursuant to section 129 of the *Safe Drinking Water Act*, Danny Wilson (the "Appellant") appealed the decision of the Director, Ministry of the Environment to refuse to issue a Water Distribution Class I Certificate ("Certificate") to the Appellant.

At the Preliminary Hearing, the Parties noted that this appeal related to whether the Appellant possessed the appropriate qualifications in order to obtain the Certificate. The Parties agreed to participate in mediation in order to settle this dispute. Pursuant to the mediation, the Parties entered into a settlement agreement that indicated that the Director would issue the Certificate to the Appellant because the Appellant had demonstrated that he qualified.

The Tribunal found that the settlement agreement was consistent with the provisions of the Act and in the public interest. Accordingly, the Tribunal accepted the withdrawal and dismissed the appeal.

Decision Released: February 12, 2009 (Case No.: 08-113)

Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal

Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)

Lafarge Canada Inc. (the "Appellant") sought to judicially review the decision of the Tribunal dated April 4, 2007. In that decision, pursuant to the *Environmental Bill of Rights* ("*EBR*"), the Tribunal granted several Applicants Leave to Appeal the decisions of two Directors, Ministry of the Environment ("MOE") to issue Certificates of Approval (Air) and (Waste) ("CofAs") under the *Environmental Protection Act* ("*EPA*"). The CofA's related to the Appellant's cement manufacturing facility in Bath, Ontario. The CofA (Waste) related to the temporary storing of waste materials that would be used as an alternative fuel stream. The CofA (Air) was to replace the Appellant's existing certificates for all sources of air emissions.

In its decision, the Tribunal found that the first branch of the section 41 *EBR* test could be met if a decision to issue a CofA was made without regard to the guiding principles in the MOE's Statement of Environmental Values ("SEV"). The Tribunal found that the Applicants met the first branch of the section 41 test on four grounds: the failure to consider the ecosystem approach and the precautionary principle set out in the SEV, the failure to consider the common law rights of landowners, and inconsistent treatment of Bath residents and other Ontario residents. For the second branch of the section 41 test, the Tribunal found that the kinds of contaminants to be emitted by the Appellant's operations, including emissions from the burning of tires, were potentially hazardous to the environment and human health.

As a preliminary matter, the Divisional Court found that the standard of review in this application was reasonableness.

With regard to the Tribunal's interpretation of the section 41 test generally, the Court found that the Tribunal was not only reasonable in its interpretation, but also correct. The Court also found that the Tribunal was reasonable in concluding that the Applicants met the section 41 test.

Divisional Court findings with regard to the first branch of the section 41 test:

- The Tribunal finding that the Director, MOE, was required to consider the MOE's SEVs was reasonable.
- The Tribunal finding that the Director, MOE, was required to consider the common law rights of landowners was reasonable.
- The Tribunal finding that the Director, MOE, was required to take into account "environmental consistency" by treating the residents of Bath in the same manner as other Ontario residents was reasonable.

With regard to the section branch of the section 41 test, the Court found that the Tribunal gave adequate reasons for concluding that the test had been met.

The Court also considered whether the Tribunal was reasonable in granting the Applicants full Leave to Appeal both CofAs even though the Tribunal found that only specified grounds had satisfied the leave test under section 41. The Court found that the Tribunal retains overall authority over the scope of the appeal with regard to the subject matter of the proceeding. Therefore, the Tribunal's decision was reasonable.

As a final matter, the Court considered whether the doctrine of laches barred the Court from granting a remedy. In the present case, the Judicial Review application was filed six months after the release of the Tribunal decision. The Court found that in any future applications of this nature, Judicial Reviews of *EBR* decisions, should move more quickly or risk having the application dismissed for delay. The Court made this finding on the basis that the *EBR* specifies that Leave to Appeal applications must be filed with the Tribunal within 15 days and the *EBR* prohibits the appeal of Leave to Appeal decisions.

Decision Released: June 18, 2008

Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)

Application for Leave to Appeal to the Court of Appeal of Ontario dismissed.

Decision Released: November 26, 2008

Report on Performance Measures
Fiscal Year 2008-2009

For fiscal year 2008-2009, the Tribunal adopted nine goals that are critical to the effective and efficient performance and service quality of the Tribunal's main functions.

In this fiscal year, the Tribunal met or exceeded the performance measures in all nine targeted areas. "The Key Performance Goals" for the next fiscal year 2009-2010 are set out in Appendix D.

Commitment #1: Tribunal Members will Treat All Participants with Courtesy and Respect

In order to monitor the performance of Tribunal Members, the Tribunal sends out questionnaires after every mediation and hearing. These questionnaires provide feedback and assist the Tribunal in improving the hearing process. The questionnaires include questions relating explicitly to the conduct and performance of the Tribunal Members during the hearing process. Of those questionnaires completed, 100% reported satisfaction with Member courtesy.

The Tribunal has a formal policy and process for complaints received from the parties or the public concerning its Members. The Tribunal did not receive any complaints concerning its Members during this fiscal year.

Commitment #2: Tribunal Members will Render Timely Decisions

Legislation requires that all recommendations/decisions made under the *Niagara Escarpment Planning and Development Act* on appeals regarding development permit applications be issued within 30 days of the conclusion of the hearing or within such longer period as the Minister of Natural Resources may allow. Of the total cases carried forward and received this fiscal year under the *Niagara Escarpment Planning and Development Act* that resulted in a hearing and a decision, 70% of the decisions were rendered within 30 days of the completion of the hearing.

Niagara Escarpment Plan amendment application decisions must be rendered not more than 60 days after the conclusion of the hearing or within such extended time as the Niagara Escarpment Commission may specify. During this fiscal, the Niagara Escarpment Hearing Office did not receive any plan amendment applications.

Tribunal decisions regarding the *Environmental Bill of Rights, 1993* leave to appeal applications are to be made within 30 days after the day on which the application is filed, unless the Tribunal has determined that, because of unusual circumstances, a longer period is needed.

In all other types of decisions, Tribunal members endeavour to render 80% of their decisions within 60 days of the completion of the hearing or the filing of final written submissions (if ordered by the hearing panel).

For the purposes of this performance measure, the commitment was defined as *"80% of all Decisions will be rendered within 60 days of final argument, excepting hearings with legislative timelines."* For the fiscal year 2008-2009, the timeliness of decisions rendered was captured for those decisions issued on appeals under the *Environmental Protection Act*, the *Ontario Water Resources Act*, and the *Safe Drinking Water Act, 2002*. There were no applications under the *Environmental Assessment Act*, the *Environmental Protection Act* and the *Ontario Water Resources Act*. In this fiscal year, the Tribunal Members released their decisions within 60 days of the final argument in 85% of the decisions issued for these cases. The Tribunal Members and staff work towards a timely decision release process. Tribunal staff will continue to monitor and regularly remind Members of the timelines for releasing their decisions. The Tribunal remains committed to timely decisions.

Commitment #3: Tribunal Members will be Trained

New Members are trained in the hearing process, conduct of hearings, knowledge of legislation, Tribunal Rules and decision-writing. They receive one-on-one training regarding the hearing process, legislation, conduct of hearings, the Tribunal Rules and Practice Directions and decision writing from in-house staff. Members attend training courses on adjudication and decision-writing conducted by the Society of Ontario Adjudicators and Regulators. Vice-Chairs also attend the five-day course on alternative dispute resolution offered by the Stitt Feld Handy Group. All Members attend hearings, first as an observer, and then as a member of a hearing panel before conducting hearings independently.

The Tribunal has strengthened its training for Members and included four in-house sessions in its Learning Programs. During this last fiscal year, training sessions in its Learning Programs were held to review Conflict of Interest Rules, policies, processes, updates on conferences and seminars. The Tribunal also provided two webcasts by the Law Society of Upper Canada and the Ministry of Aboriginal Affairs. The Tribunal will continue to provide in-house training as part of its Learning Programs in the next fiscal year. The Learning Programs are outlined in Appendix C.

Commitment #4: Offer Pre-Hearing Conferences in Appeals and Plan Amendments under the *Niagara Escarpment Planning and Development Act ("NEPDA")*

The Tribunal is committed to providing pre-hearing conferences for matters under the *NEPDA* and preliminary hearings for all other appeals and applications. The pre-hearing conferences were held via teleconference and preliminary hearings were held at least 30 days prior to the commencement of the hearing.

Thirty-two pre-hearing conference days and 49 preliminary hearing days were held during this last fiscal year. The Tribunal will continue to offer pre-hearing conferences for *NEPDA* matters and provide preliminary hearings for all other matters. However, pre-hearing conferences are not mandatory and can only be held if the parties agree to participate.

At pre-hearing conferences, the Hearing Officers inquire whether Parties have had an opportunity to discuss the issues in efforts to settle the matter. During this fiscal year, out of 48 cases where

pre-hearing conferences were held, 20 cases were settled, 18 cases were withdrawn, five cases proceeded to a hearing and five cases are still on-going.

Commitment #5: Report on Requests for Review, Appeals and Judicial Reviews of Tribunal Decisions

The Tribunal has committed to reporting on the outcome of any appeals or judicial review applications of its decisions. This fiscal year, the Tribunal received decisions of the Divisional Court and the Court of Appeal and has reported on those decisions in this Annual Report under Summaries of Appeals and Judicial Reviews of Decisions of the Tribunal.

Commitment #6: Continue to Schedule Hearings within the Timeliness Standard

The Tribunal has adopted a standard to issue a Notice of Hearing within 30 calendar days of the date of receipt of the appeal. During this fiscal year, the Tribunal exceeded that target, as the average time to issue a Notice of Hearing from the date of the receipt of the appeal was 28 days.

During this fiscal year, the staff also exceeded the scheduling expectation. On average, hearings were scheduled four calendar days after receipt of all required information, which exceeds our performance target of seven calendar days.

Commitment #7: Offer Mediation Services in All Appeal Cases, Where Appropriate. Upon Request provide Mediation Services in Application Cases, After a Preliminary Hearing is held and Prior to the Commencement of the Hearing

Mediation services are available to all parties in matters before the Tribunal. The Tribunal formally offers these services in every appeal (except in matters filed under the *Niagara Escarpment Planning and Development Act*) and, upon request, in all applications in order to encourage parties to resolve their issues. In this fiscal year, parties participated in mediations during the hearing process in 12 cases compared to 5 cases last fiscal year. Of the 12 cases where mediation took place, four cases were settled, two cases were dismissed and six cases are still ongoing.

These statistics indicate that the Tribunal mediation services are successful in resolving issues, narrowing the scope of those issues proceeding to a hearing and in reducing hearing time and costs for both the public and the government.

Tribunal members who conducted mediation sessions were certified through an accredited course. Questionnaires are regularly sent to parties after each mediation session to obtain feedback on the Tribunal's performance. Of the responses received, 87% expressed overall satisfaction with the mediation process.

Commitment #8: The Tribunal will Use its Website to Provide Information and Communicate with the Public

The website is the primary tool for the public and clients to access information about the Tribunal and its processes, including hearing information, Tribunal publications and Orders and Decisions. From April 1, 2008 to March 31, 2009, the Tribunal had a total of 56,443 visitors to its site and a total of 607,595 "hits" on specific pages in the site. The Tribunal's Annual Reports and Guides were the most popular downloads and visits to the site. Copies of the Annual Reports were downloaded almost 3,000 times; copies of the Guides were downloaded over 2,000 times; the Business Plan, over 1,700 times and the Rules of Practice and Practice Directions, 1,200 times. During the year, there was a total of 291,358 downloads of documents from its website, including approximately 281,294 downloads of Tribunal Decisions and Orders. "Webtrends" is used to monitor the Tribunal's statistics. During this fiscal year, this reporting tool was improved which resulted in more accurate statistical information regarding the Tribunal's website than what was reported in previous years.

The staff has made a commitment to update the website within 24 hours of receiving a change. Since the co-location of the Tribunal, the responsibility for posting certain updates rests with the Justice IT Cluster which may result in delays in accessing the Tribunal's website.

The Tribunal continues to ensure that the public has access to the most current documents available. Decisions and Orders, Rules of Practice and Practice Directions, as well as the current published Annual Report, Business Plan and Guides are posted. During 2008-2009, the Tribunal completed the posting of all archived decisions on its website.

The number of visitors to the Tribunal's website continues to increase. During the last fiscal, the Tribunal improved its search engine resulting in a more efficient retrieval of specific decisions and orders. In July 2008, the Tribunal updated its website to include hearing locations and access for the electronic filing of appeals. Although the Tribunal only received one appeal through its electronic filing process, the Tribunal received a number of appeals via the email address provided on its website.

The Tribunal continues to review and make changes to its website to provide the public with more comprehensive access to information, Decisions and Orders of the Tribunal.

Commitment #9: Rules, Guides and Tribunal Policies will be Updated

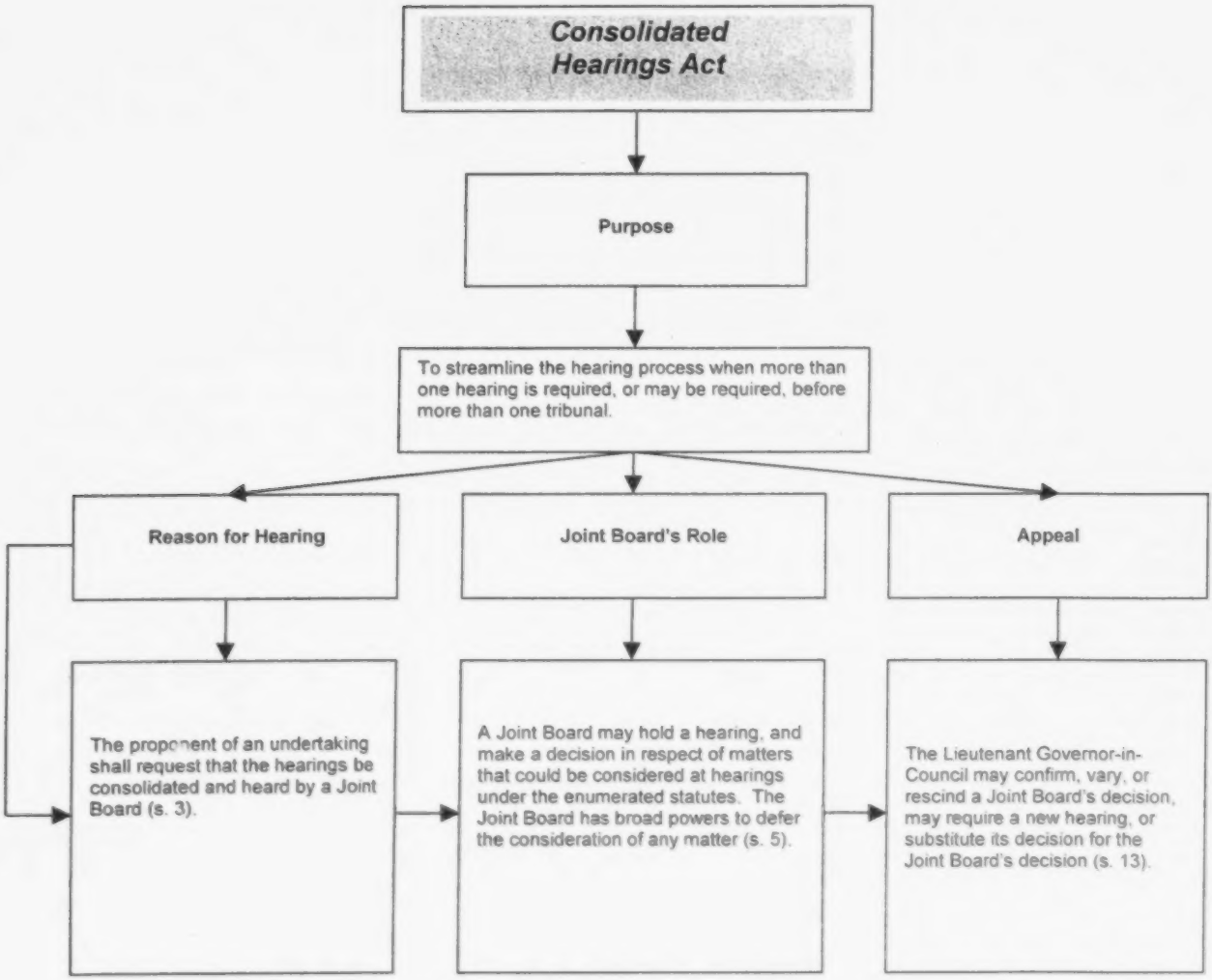
The Tribunal updates its Rules of Practice and Practice Directions immediately following changes to legislation affecting the Tribunal's mandate or whenever housekeeping amendments are required. The Tribunal will continue to update its "Guides" to reflect any changes to its Rules of Practice and Practice Directions.

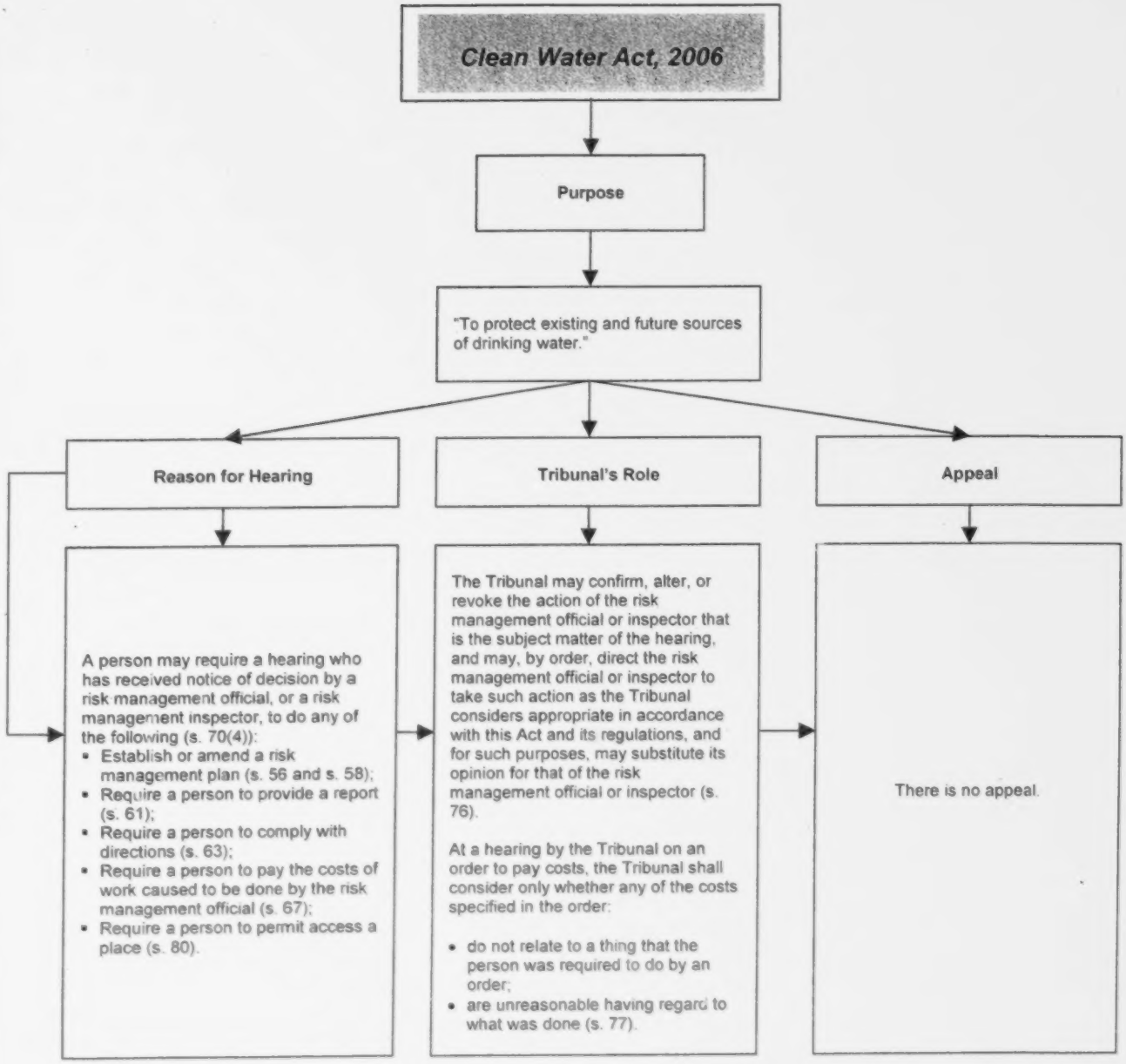
Tribunal Policies, such as the Complaints Policy, will be updated and posted on the website. As new policies are developed, they will also be posted on the Tribunal's website.

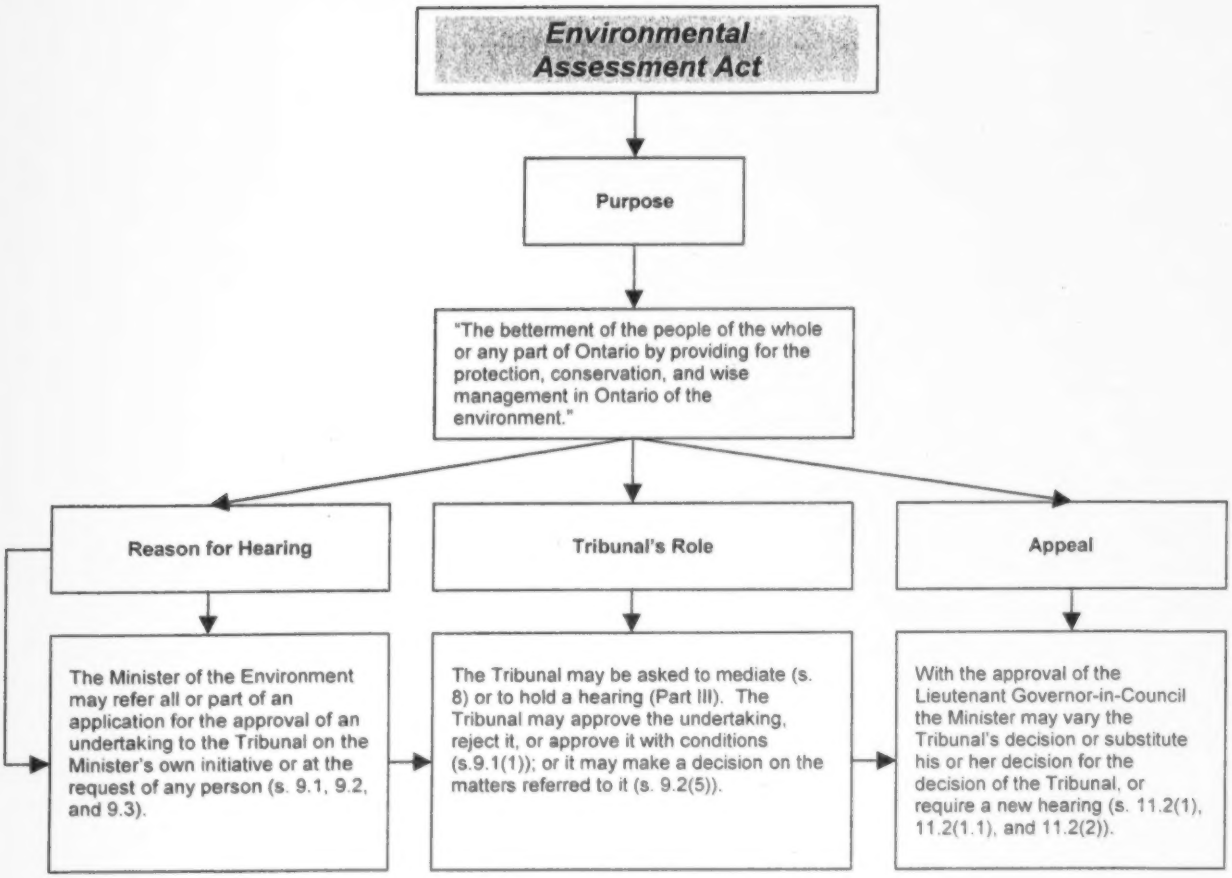
During the fiscal year 2008-2009, the Tribunal completed its Conflict of Interest Rules and revised its Complaints Policy. The Tribunal did not make any revisions to its Guides.

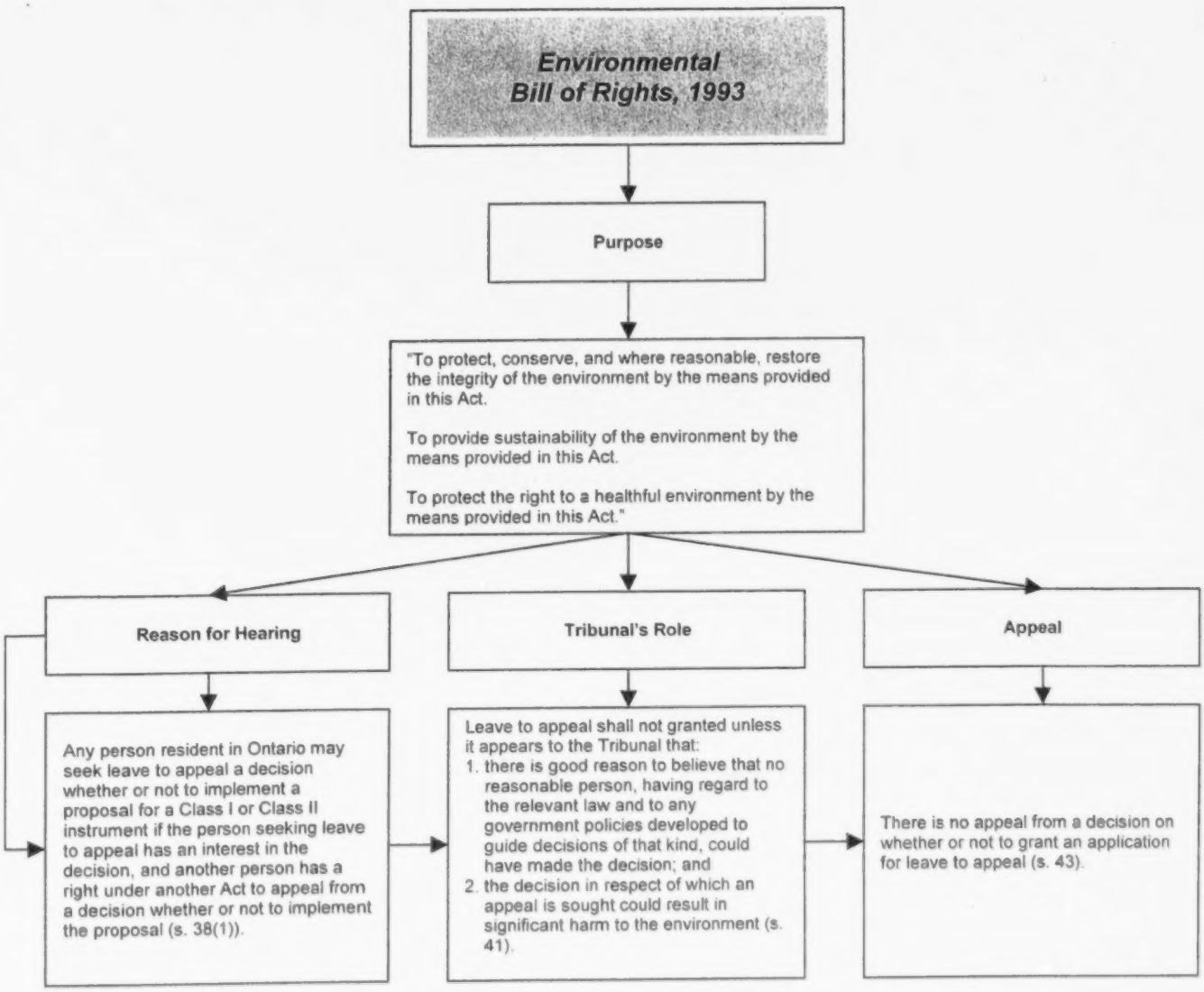
Appendix A

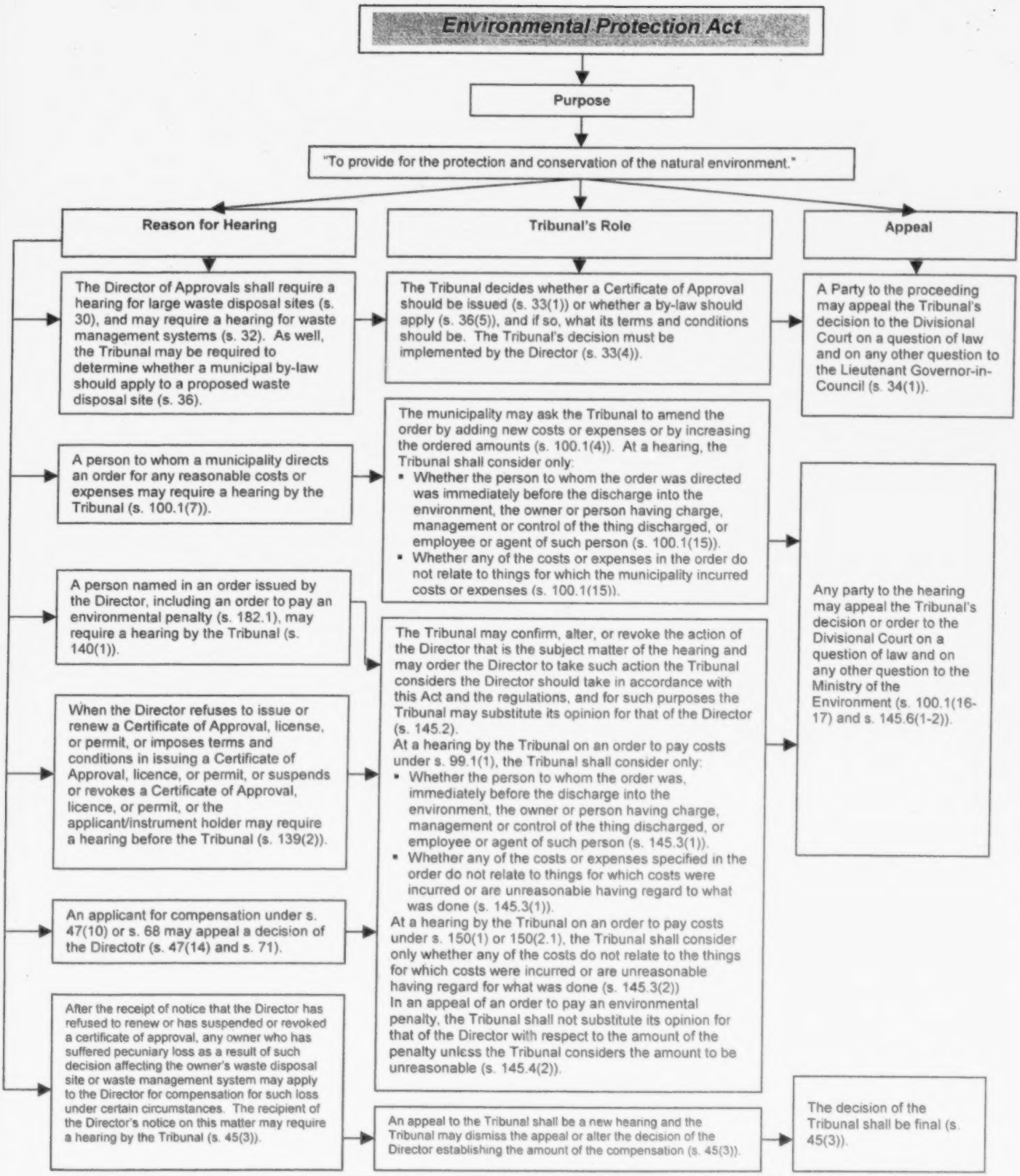
Overview of Relevant Legislation

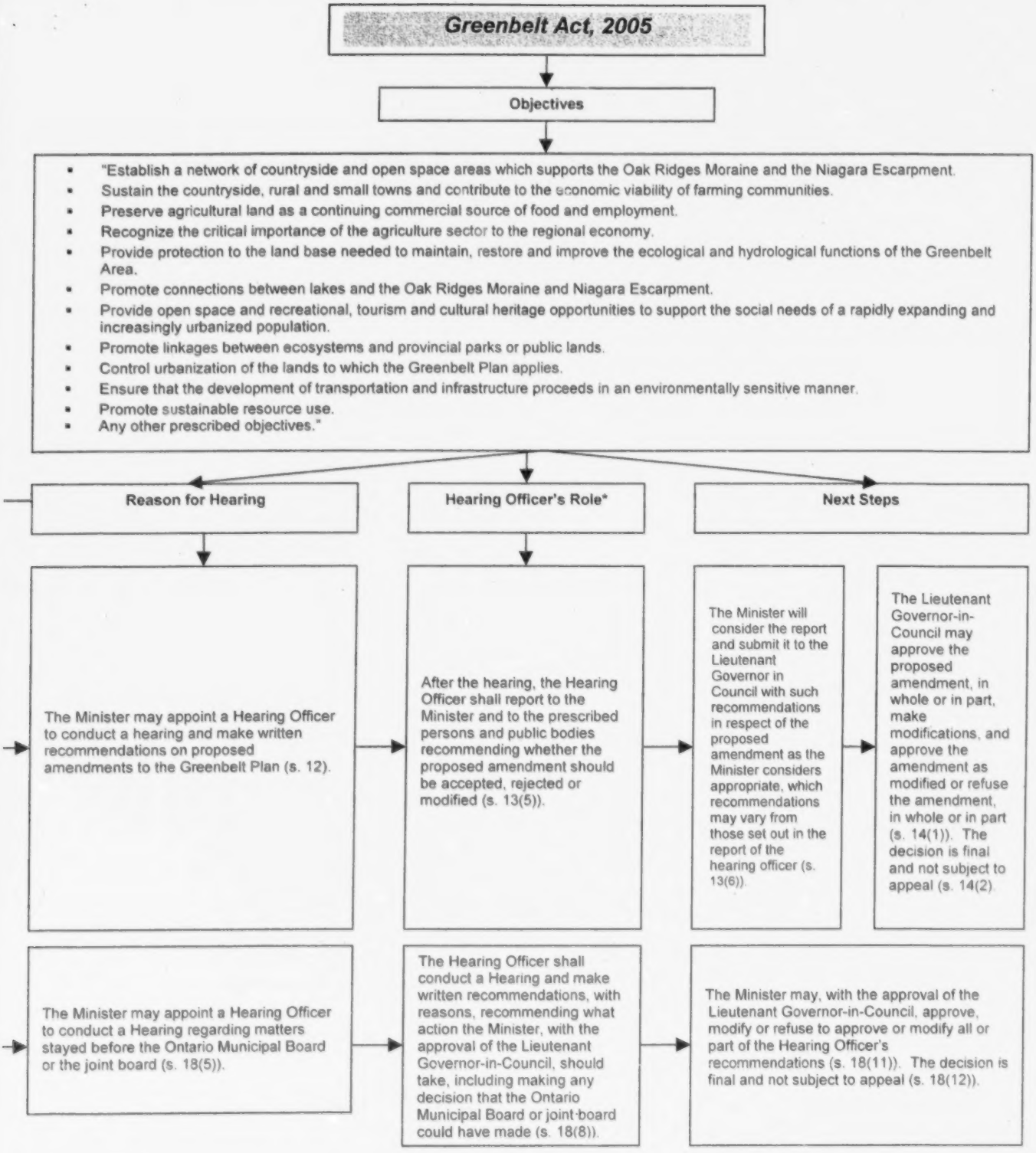

Consolidated Hearings Act
Purpose
To streamline the hearing process when more than one hearing is required, or may be required, before more than one tribunal.
Reason for Hearing
Joint Board's Role
Appeal
The proponent of an undertaking shall request that the hearings be consolidated and heard by a Joint Board (s. 3).
A Joint Board may hold a hearing, and make a decision in respect of matters that could be considered at hearings under the enumerated statutes. The Joint Board has broad powers to defer the consideration of any matter (s. 5).
The Lieutenant Governor-in-Council may confirm, vary, or rescind a Joint Board's decision, may require a new hearing, or substitute its decision for the Joint Board's decision (s. 13).


Clean Water Act, 2006
Purpose
"To protect existing and future sources of drinking water."
Reason for Hearing
Tribunal's Role
Appeal
A person may require a hearing who has received notice of decision by a risk management official, or a risk management inspector, to do any of the following (s. 70(4)):
• Establish or amend a risk management plan (s. 56 and s. 58);
• Require a person to provide a report (s. 61);
• Require a person to comply with directions (s. 63);
• Require a person to pay the costs of work caused to be done by the risk management official (s. 67);
• Require a person to permit access a place (s. 80).
The Tribunal may confirm, alter, or revoke the action of the risk management official or inspector that is the subject matter of the hearing, and may, by order, direct the risk management official or inspector to take such action as the Tribunal considers appropriate in accordance with this Act and its regulations, and for such purposes, may substitute its opinion for that of the risk management official or inspector (s. 76).
At a hearing by the Tribunal on an order to pay costs, the Tribunal shall consider only whether any of the costs specified in the order:
• do not relate to a thing that the person was required to do by an order;
• are unreasonable having regard to what was done (s. 77).
There is no appeal.

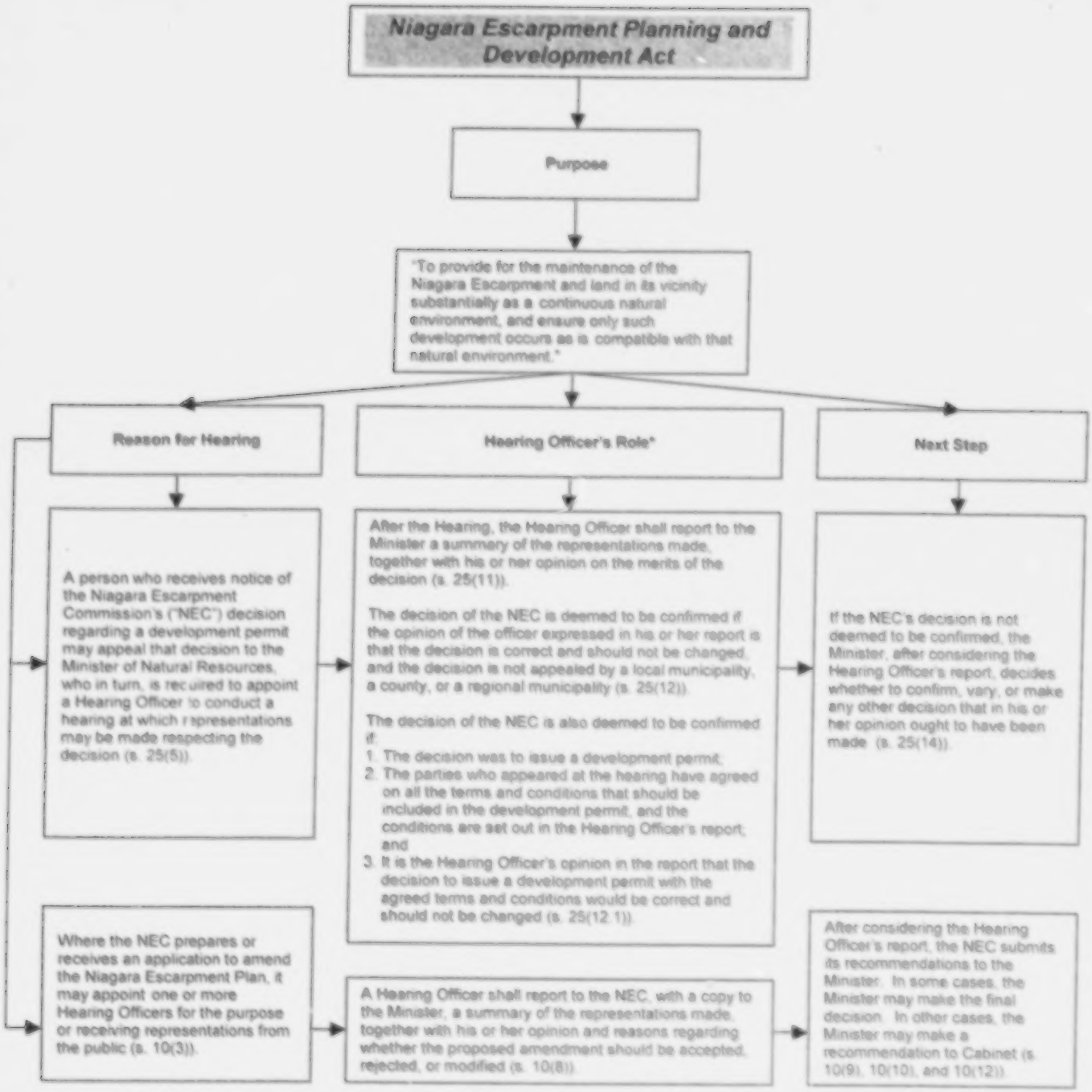

Environmental Assessment Act
Purpose
"The betterment of the people of the whole or any part of Ontario by providing for the protection, conservation, and wise management in Ontario of the environment."
Reason for Hearing
Tribunal's Role
Appeal
The Minister of the Environment may refer all or part of an application for the approval of an undertaking to the Tribunal on the Minister's own initiative or at the request of any person (s. 9.1, 9.2, and 9.3).
The Tribunal may be asked to mediate (s. 8) or to hold a hearing (Part III). The Tribunal may approve the undertaking, reject it, or approve it with conditions (s.9.1(1)); or it may make a decision on the matters referred to it (s. 9.2(5)).
With the approval of the Lieutenant Governor-in-Council the Minister may vary the Tribunal's decision or substitute his or her decision for the decision of the Tribunal, or require a new hearing (s. 11.2(1), 11.2(1.1), and 11.2(2)).


Environmental Bill of Rights, 1993
Purpose
"To protect, conserve, and where reasonable, restore the integrity of the environment by the means provided in this Act.
To provide sustainability of the environment by the means provided in this Act.
To protect the right to a healthful environment by the means provided in this Act."
Reason for Hearing
Tribunal's Role
Appeal
Any person resident in Ontario may seek leave to appeal a decision whether or not to implement a proposal for a Class I or Class II instrument if the person seeking leave to appeal has an interest in the decision, and another person has a right under another Act to appeal from a decision whether or not to implement the proposal (s. 38(1)).
Leave to appeal shall not granted unless it appears to the Tribunal that:
1. there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and
2. the decision in respect of which an appeal is sought could result in significant harm to the environment (s. 41).
There is no appeal from a decision on whether or not to grant an application for leave to appeal (s. 43).

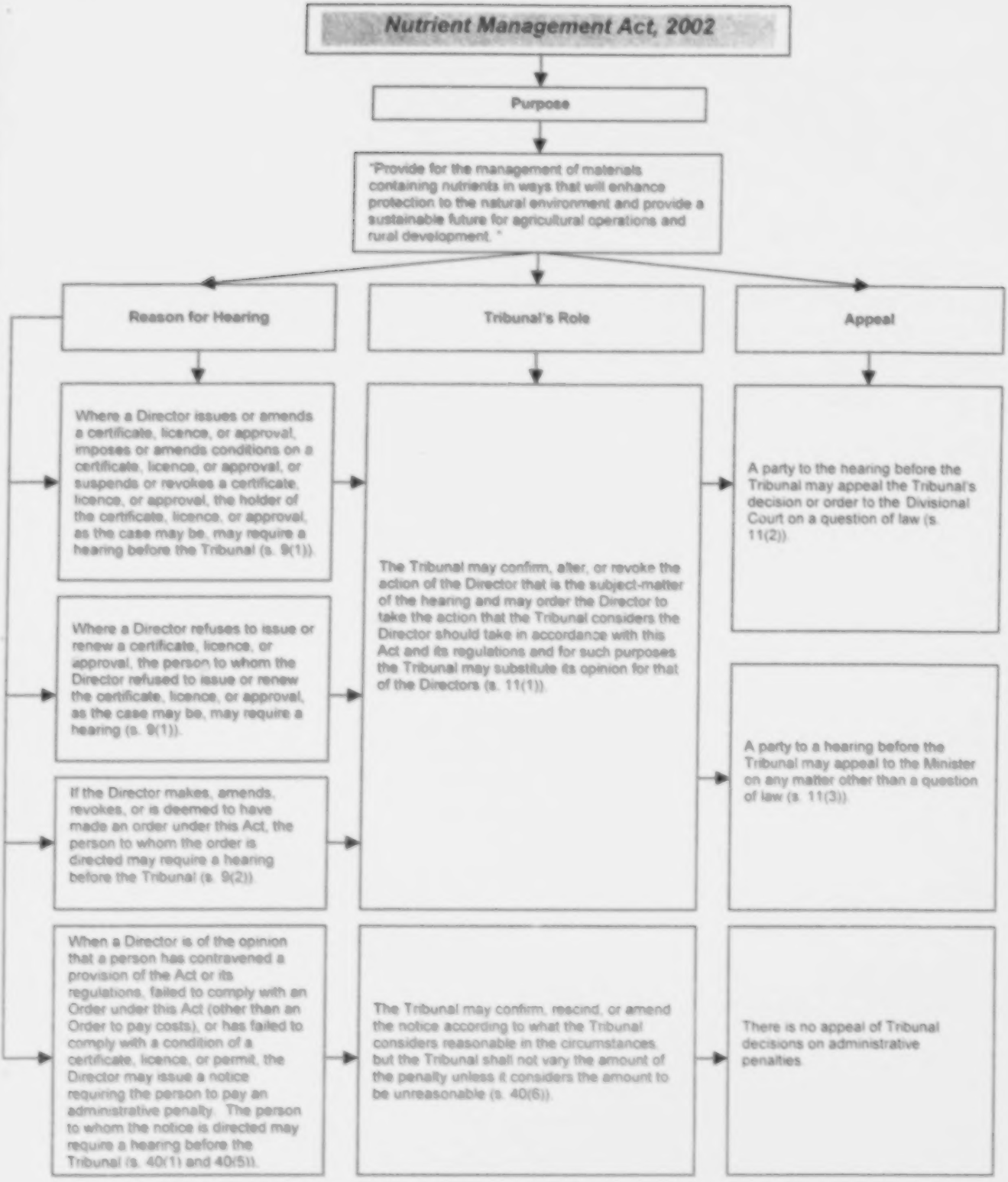

Environmental Protection Act
Purpose
"To provide for the protection and conservation of the natural environment."
Reason for Hearing
Tribunal's Role
Appeal
The Director of Approvals shall require a hearing for large waste disposal sites (s. 30), and may require a hearing for waste management systems (s. 32). As well, the Tribunal may be required to determine whether a municipal by-law should apply to a proposed waste disposal site (s. 36).
The Tribunal decides whether a Certificate of Approval should be issued (s. 33(1)) or whether a by-law should apply (s. 36(5)), and if so, what its terms and conditions should be. The Tribunal's decision must be implemented by the Director (s. 33(4)).
A Party to the proceeding may appeal the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor-in-Council (s. 34(1)).
A person to whom a municipality directs an order for any reasonable costs or expenses may require a hearing by the Tribunal (s. 100.1(7)).
The municipality may ask the Tribunal to amend the order by adding new costs or expenses or by increasing the ordered amounts (s. 100.1(4)). At a hearing, the Tribunal shall consider only:
Whether the person to whom the order was directed was immediately before the discharge into the environment, the owner or person having charge, management or control of the thing discharged, or employee or agent of such person (s. 100.1(15)).
Whether any of the costs or expenses in the order do not relate to things for which the municipality incurred costs or expenses (s. 100.1(15)).
A person named in an order issued by the Director, including an order to pay an environmental penalty (s. 182.1), may require a hearing by the Tribunal (s. 140(1)).
When the Director refuses to issue or renew a Certificate of Approval, license, or permit, or imposes terms and conditions in issuing a Certificate of Approval, licence, or permit, or suspends or revokes a Certificate of Approval, licence, or permit, or the applicant/instrument holder may require a hearing before the Tribunal (s. 139(2)).
The Tribunal may confirm, alter, or revoke the action of the Director that is the subject matter of the hearing and may order the Director to take such action the Tribunal considers the Director should take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director (s. 145.2).
At a hearing by the Tribunal on an order to pay costs under s. 99.1(1), the Tribunal shall consider only:
Whether the person to whom the order was, immediately before the discharge into the environment, the owner or person having charge, management or control of the thing discharged, or employee or agent of such person (s. 145.3(1)).
Whether any of the costs or expenses specified in the order do not relate to things for which costs were incurred or are unreasonable having regard to what was done (s. 145.3(1)).
At a hearing by the Tribunal on an order to pay costs under s. 150(1) or 150(2.1), the Tribunal shall consider only whether any of the costs do not relate to the things for which costs were incurred or are unreasonable having regard for what was done (s. 145.3(2))
In an appeal of an order to pay an environmental penalty, the Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable (s. 145.4(2)).
Any party to the hearing may appeal the Tribunal's decision or order to the Divisional Court on a question of law and on any other question to the Ministry of the Environment (s. 100.1(16-17) and s. 145.6(1-2)).
An applicant for compensation under s. 47(10) or s. 68 may appeal a decision of the Directotr (s. 47(14) and s. 71).
After the receipt of notice that the Director has refused to renew or has suspended or revoked a certificate of approval, any owner who has suffered pecuniary loss as a result of such decision affecting the owner's waste disposal site or waste management system may apply to the Director for compensation for such loss under certain circumstances. The recipient of the Director's notice on this matter may require a hearing by the Tribunal (s. 45(3)).
An appeal to the Tribunal shall be a new hearing and the Tribunal may dismiss the appeal or alter the decision of the Director establishing the amount of the compensation (s. 45(3)).
The decision of the Tribunal shall be final (s. 45(3)).

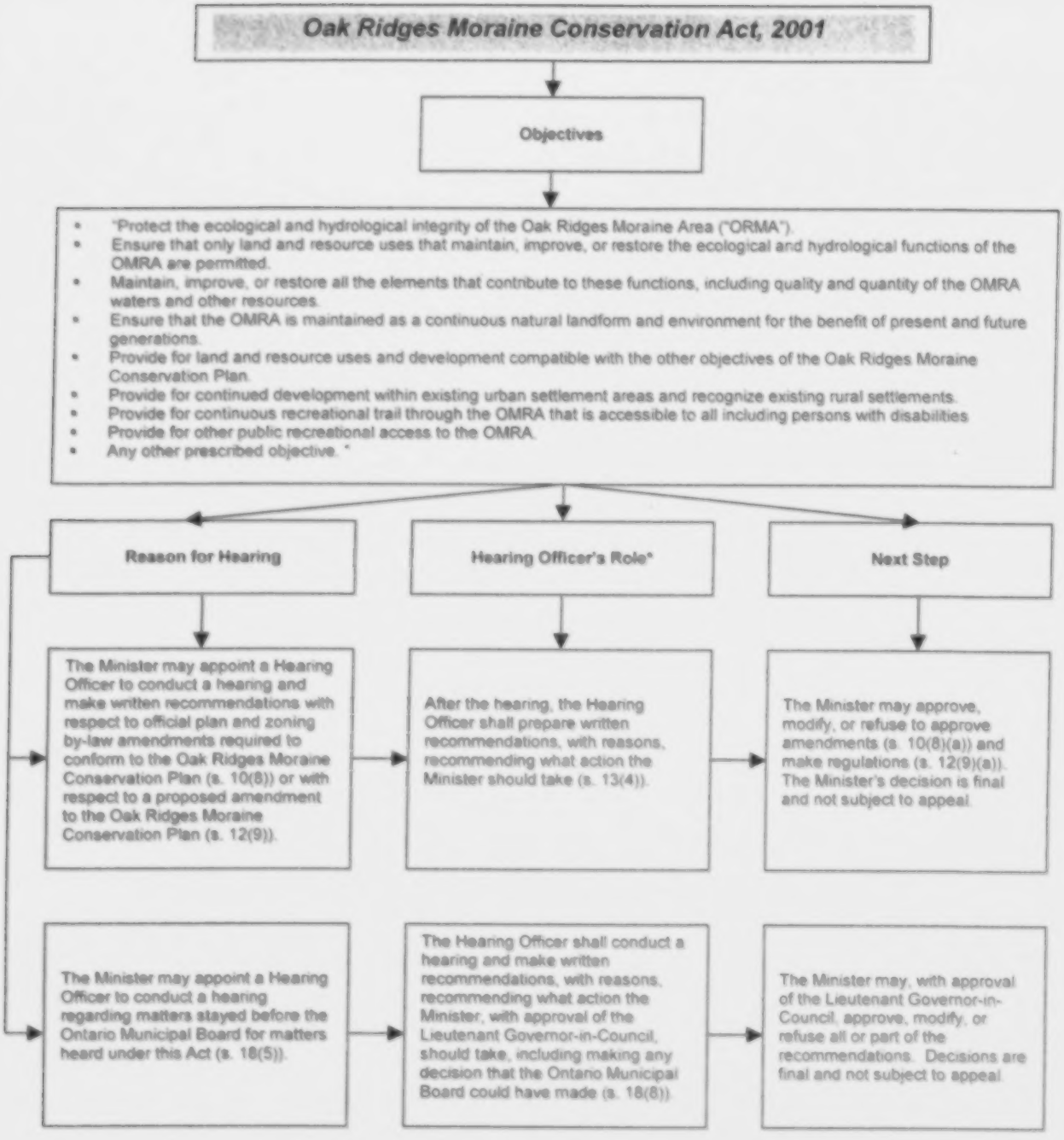

Greenbelt Act, 2005
Objectives
"Establish a network of countryside and open space areas which supports the Oak Ridges Moraine and the Niagara Escarpment.
Sustain the countryside, rural and small towns and contribute to the economic viability of farming communities.
Preserve agricultural land as a continuing commercial source of food and employment.
Recognize the critical importance of the agriculture sector to the regional economy.
Provide protection to the land base needed to maintain, restore and improve the ecological and hydrological functions of the Greenbelt Area.
Promote connections between lakes and the Oak Ridges Moraine and Niagara Escarpment.
Provide open space and recreational, tourism and cultural heritage opportunities to support the social needs of a rapidly expanding and increasingly urbanized population.
Promote linkages between ecosystems and provincial parks or public lands.
Control urbanization of the lands to which the Greenbelt Plan applies.
Ensure that the development of transportation and infrastructure proceeds in an environmentally sensitive manner.
Promote sustainable resource use.
Any other prescribed objectives."
Reason for Hearing
Hearing Officer's Role*
Next Steps
The Minister may appoint a Hearing Officer to conduct a hearing and make written recommendations on proposed amendments to the Greenbelt Plan (s. 12).
After the hearing, the Hearing Officer shall report to the Minister and to the prescribed persons and public bodies recommending whether the proposed amendment should be accepted, rejected or modified (s. 13(5)).
The Minister will consider the report and submit it to the Lieutenant Governor in Council with such recommendations in respect of the proposed amendment as the Minister considers appropriate, which recommendations may vary from those set out in the report of the hearing officer (s. 13(6)).
The Lieutenant Governor-in-Council may approve the proposed amendment, in whole or in part, make modifications, and approve the amendment as modified or refuse the amendment, in whole or in part (s. 14(1)). The decision is final and not subject to appeal (s. 14(2).
The Minister may appoint a Hearing Officer to conduct a Hearing regarding matters stayed before the Ontario Municipal Board or the joint board (s. 18(5)).
The Hearing Officer shall conduct a Hearing and make written recommendations, with reasons, recommending what action the Minister, with the approval of the Lieutenant Governor-in-Council, should take, including making any decision that the Ontario Municipal Board or joint board could have made (s. 18(8)).
The Minister may, with the approval of the Lieutenant Governor-in-Council, approve, modify or refuse to approve or modify all or part of the Hearing Officer's recommendations (s. 18(11)). The decision is final and not subject to appeal (s. 18(12)).

* The Tribunal was appointed as the Hearing Officer under the *Greenbelt Act, 2005* on July 6, 2007.

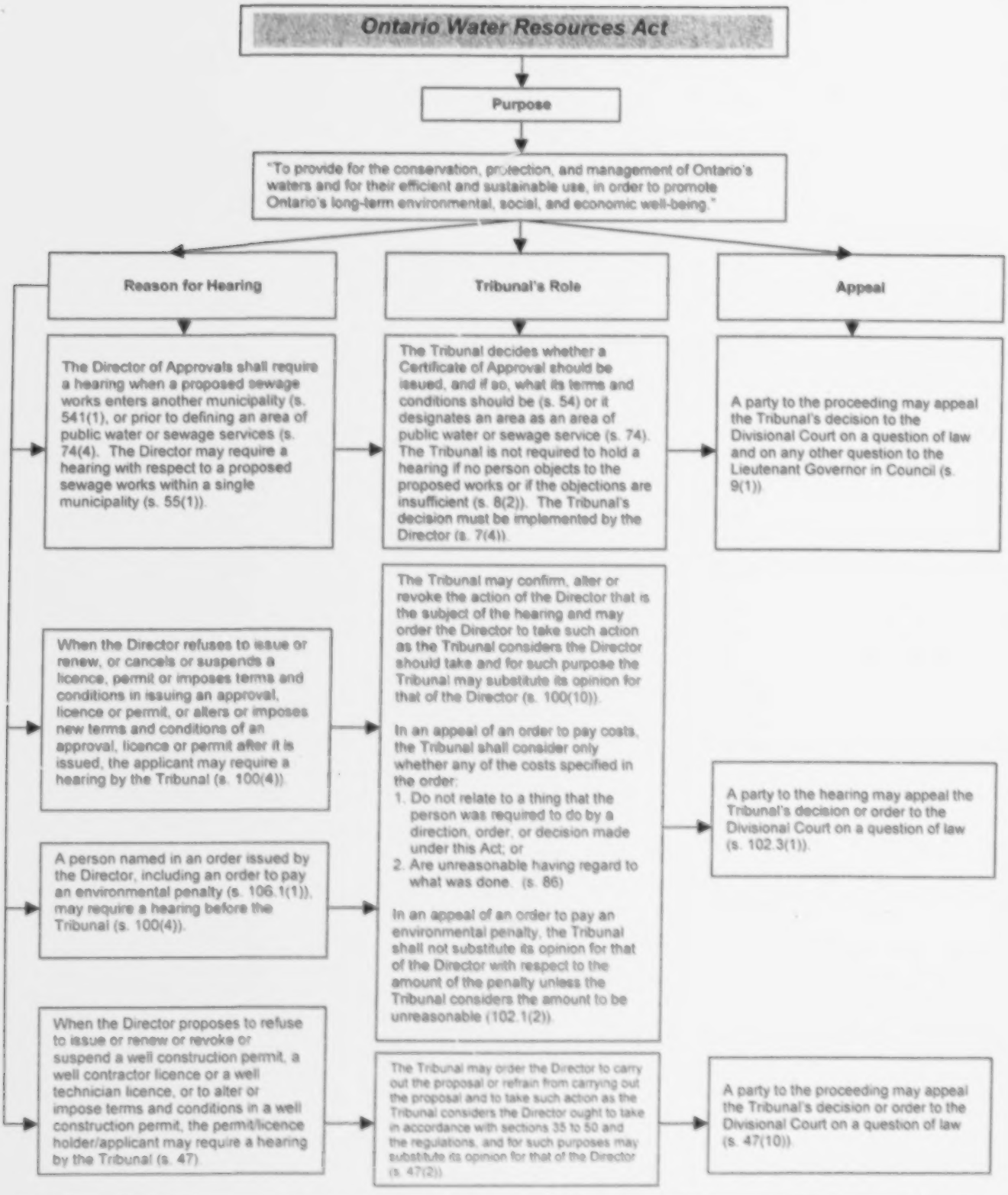

Niagara Escarpment Planning and Development Act
Purpose
"To provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and ensure only such development occurs as is compatible with that natural environment."
Reason for Hearing
Hearing Officer's Role*
Next Step
A person who receives notice of the Niagara Escarpment Commission's ("NEC") decision regarding a development permit may appeal that decision to the Minister of Natural Resources, who in turn, is required to appoint a Hearing Officer to conduct a hearing at which representations may be made respecting the decision (s. 25(5)).
After the Hearing, the Hearing Officer shall report to the Minister a summary of the representations made, together with his or her opinion on the merits of the decision (s. 25(11)).
The decision of the NEC is deemed to be confirmed if the opinion of the officer expressed in his or her report is that the decision is correct and should not be changed, and the decision is not appealed by a local municipality, a county, or a regional municipality (s. 25(12)).
The decision of the NEC is also deemed to be confirmed if:
1. The decision was to issue a development permit;
2. The parties who appeared at the hearing have agreed on all the terms and conditions that should be included in the development permit, and the conditions are set out in the Hearing Officer's report; and
3. It is the Hearing Officer's opinion in the report that the decision to issue a development permit with the agreed terms and conditions would be correct and should not be changed (s. 25(12.1)).
If the NEC's decision is not deemed to be confirmed, the Minister, after considering the Hearing Officer's report, decides whether to confirm, vary, or make any other decision that in his or her opinion ought to have been made (s. 25(14)).
Where the NEC prepares or receives an application to amend the Niagara Escarpment Plan, it may appoint one or more Hearing Officers for the purpose of receiving representations from the public (s. 10(3)).
A Hearing Officer shall report to the NEC, with a copy to the Minister, a summary of the representations made, together with his or her opinion and reasons regarding whether the proposed amendment should be accepted, rejected, or modified (s. 10(8)).
After considering the Hearing Officer's report, the NEC submits its recommendations to the Minister. In some cases, the Minister may make the final decision. In other cases, the Minister may make a recommendation to Cabinet (s. 10(9), 10(10), and 10(12)).

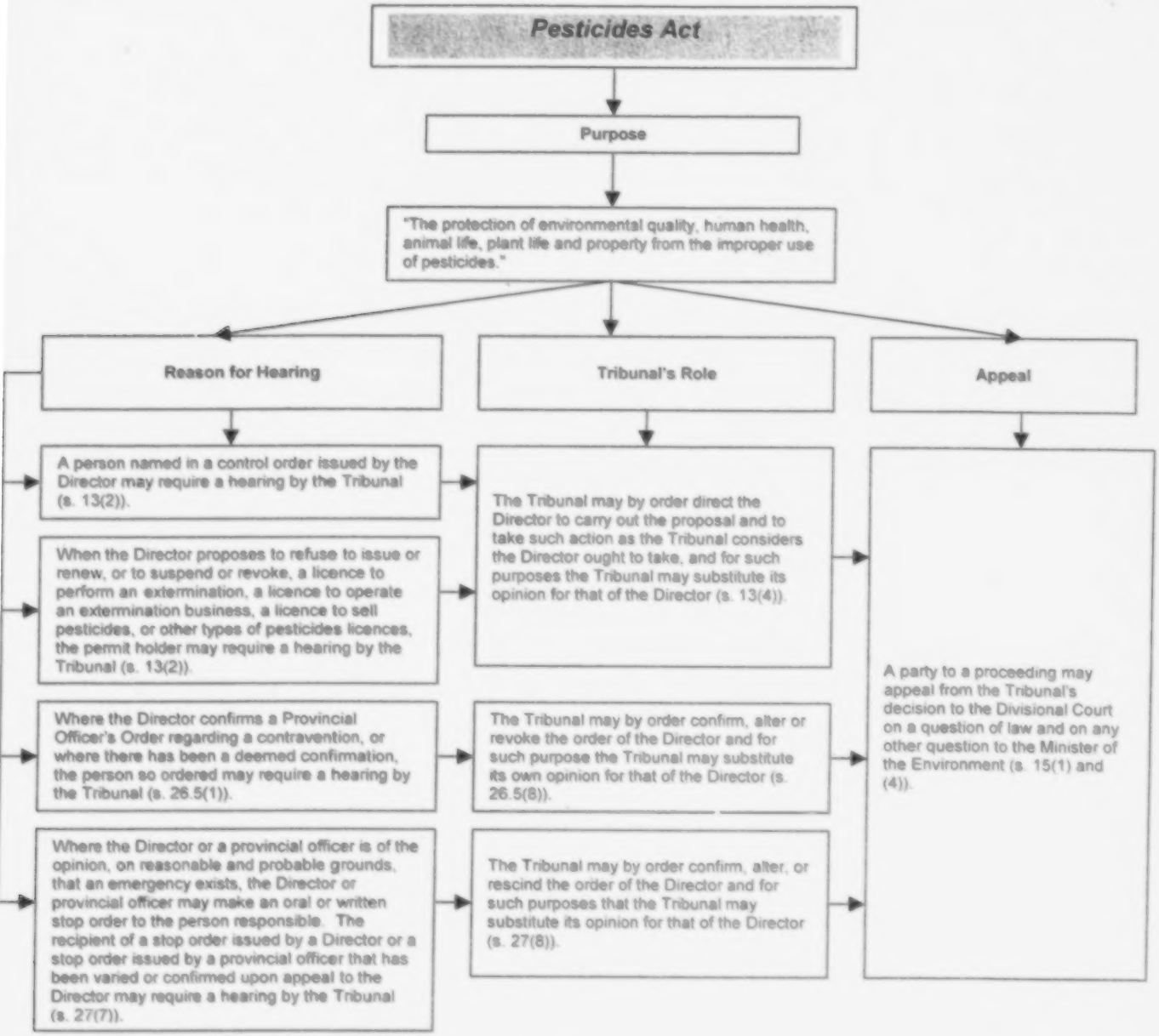
* Members of the Tribunal may be appointed as Hearing Officers under the *Niagara Escarpment Planning and Development Act* to hear appeals of Niagara Escarpment Commission decisions on development permits and to conduct hearings on applications to amend the Niagara Escarpment Plan.

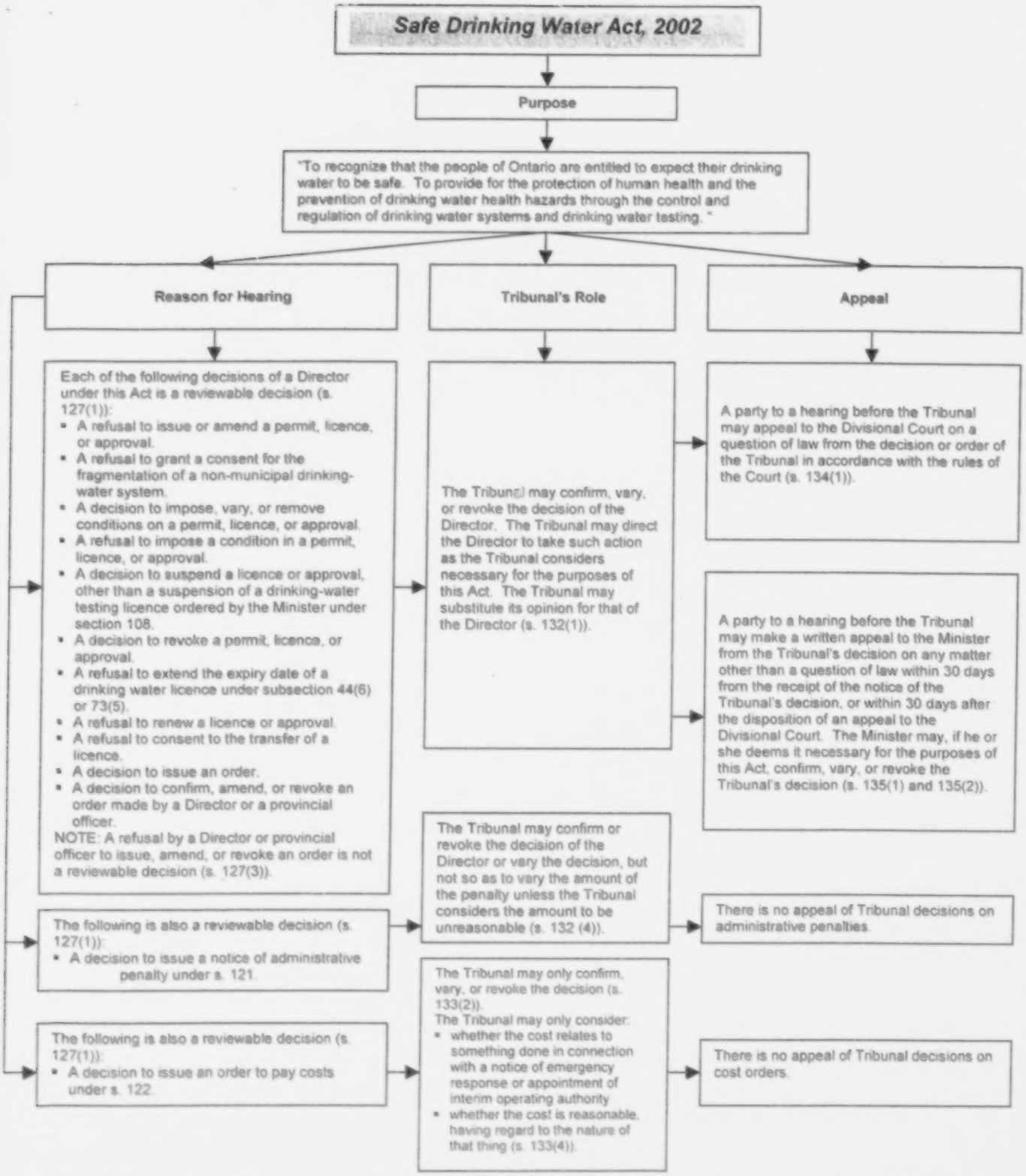

Nutrient Management Act, 2002
Purpose
"Provide for the management of materials containing nutrients in ways that will enhance protection to the natural environment and provide a sustainable future for agricultural operations and rural development."
Reason for Hearing
Tribunal's Role
Appeal
Where a Director issues or amends a certificate, licence, or approval, imposes or amends conditions on a certificate, licence, or approval, or suspends or revokes a certificate, licence, or approval, the holder of the certificate, licence, or approval, as the case may be, may require a hearing before the Tribunal (s. 9(1)).
Where a Director refuses to issue or renew a certificate, licence, or approval, the person to whom the Director refused to issue or renew the certificate, licence, or approval, as the case may be, may require a hearing (s. 9(1)).
If the Director makes, amends, revokes, or is deemed to have made an order under this Act, the person to whom the order is directed may require a hearing before the Tribunal (s. 9(2)).
When a Director is of the opinion that a person has contravened a provision of the Act or its regulations, failed to comply with an Order under this Act (other than an Order to pay costs), or has failed to comply with a condition of a certificate, licence, or permit, the Director may issue a notice requiring the person to pay an administrative penalty. The person to whom the notice is directed may require a hearing before the Tribunal (s. 40(1) and 40(5)).
The Tribunal may confirm, alter, or revoke the action of the Director that is the subject-matter of the hearing and may order the Director to take the action that the Tribunal considers the Director should take in accordance with this Act and its regulations and for such purposes the Tribunal may substitute its opinion for that of the Directors (s. 11(1)).
The Tribunal may confirm, rescind, or amend the notice according to what the Tribunal considers reasonable in the circumstances, but the Tribunal shall not vary the amount of the penalty unless it considers the amount to be unreasonable (s. 40(6)).
A party to the hearing before the Tribunal may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 11(2)).
A party to a hearing before the Tribunal may appeal to the Minister on any matter other than a question of law (s. 11(3)).
There is no appeal of Tribunal decisions on administrative penalties.


Oak Ridges Moraine Conservation Act, 2001
Objectives
"Protect the ecological and hydrological integrity of the Oak Ridges Moraine Area ("ORMA").
Ensure that only land and resource uses that maintain, improve, or restore the ecological and hydrological functions of the OMRA are permitted.
Maintain, improve, or restore all the elements that contribute to these functions, including quality and quantity of the OMRA waters and other resources.
Ensure that the OMRA is maintained as a continuous natural landform and environment for the benefit of present and future generations.
Provide for land and resource uses and development compatible with the other objectives of the Oak Ridges Moraine Conservation Plan.
Provide for continued development within existing urban settlement areas and recognize existing rural settlements.
Provide for continuous recreational trail through the OMRA that is accessible to all including persons with disabilities.
Provide for other public recreational access to the OMRA.
Any other prescribed objective. *
Reason for Hearing
Hearing Officer's Role*
Next Step
The Minister may appoint a Hearing Officer to conduct a hearing and make written recommendations with respect to official plan and zoning by-law amendments required to conform to the Oak Ridges Moraine Conservation Plan (s. 10(8)) or with respect to a proposed amendment to the Oak Ridges Moraine Conservation Plan (s. 12(9)).
After the hearing, the Hearing Officer shall prepare written recommendations, with reasons, recommending what action the Minister should take (s. 13(4)).
The Minister may approve, modify, or refuse to approve amendments (s. 10(8)(a)) and make regulations (s. 12(9)(a)). The Minister's decision is final and not subject to appeal.
The Minister may appoint a Hearing Officer to conduct a hearing regarding matters stayed before the Ontario Municipal Board for matters heard under this Act (s. 18(5)).
The Hearing Officer shall conduct a hearing and make written recommendations, with reasons, recommending what action the Minister, with approval of the Lieutenant Governor-in-Council, should take, including making any decision that the Ontario Municipal Board could have made (s. 18(8)).
The Minister may, with approval of the Lieutenant Governor-in-Council, approve, modify, or refuse all or part of the recommendations. Decisions are final and not subject to appeal.

* The Tribunal was appointed as the Hearing Officer under the *Oak Ridges Moraine Conservation Act, 2001* on July 31, 2006.


Ontario Water Resources Act
Purpose
"To provide for the conservation, protection, and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social, and economic well-being."
Reason for Hearing
Tribunal's Role
Appeal
The Director of Approvals shall require a hearing when a proposed sewage works enters another municipality (s. 541(1), or prior to defining an area of public water or sewage services (s. 74(4). The Director may require a hearing with respect to a proposed sewage works within a single municipality (s. 55(1)).
The Tribunal decides whether a Certificate of Approval should be issued, and if so, what its terms and conditions should be (s. 54) or it designates an area as an area of public water or sewage service (s. 74). The Tribunal is not required to hold a hearing if no person objects to the proposed works or if the objections are insufficient (s. 8(2)). The Tribunal's decision must be implemented by the Director (s. 7(4)).
A party to the proceeding may appeal the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Lieutenant Governor in Council (s. 9(1))
When the Director refuses to issue or renew, or cancels or suspends a licence, permit or imposes terms and conditions in issuing an approval, licence or permit, or alters or imposes new terms and conditions of an approval, licence or permit after it is issued, the applicant may require a hearing by the Tribunal (s. 100(4)).
A person named in an order issued by the Director, including an order to pay an environmental penalty (s. 106.1(1)), may require a hearing before the Tribunal (s. 100(4)).
When the Director proposes to refuse to issue or renew or revoke or suspend a well construction permit, a well contractor licence or a well technician licence, or to alter or impose terms and conditions in a well construction permit, the permit/licence holder/applicant may require a hearing by the Tribunal (s. 47).
The Tribunal may confirm, alter or revoke the action of the Director that is the subject of the hearing and may order the Director to take such action as the Tribunal considers the Director should take and for such purpose the Tribunal may substitute its opinion for that of the Director (s. 100(10)).
In an appeal of an order to pay costs, the Tribunal shall consider only whether any of the costs specified in the order:
1. Do not relate to a thing that the person was required to do by a direction, order, or decision made under this Act; or
2. Are unreasonable having regard to what was done. (s. 86)
In an appeal of an order to pay an environmental penalty, the Tribunal shall not substitute its opinion for that of the Director with respect to the amount of the penalty unless the Tribunal considers the amount to be unreasonable (102.1(2)).
A party to the hearing may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 102.3(1)).
The Tribunal may order the Director to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Director ought to take in accordance with sections 35 to 50 and the regulations, and for such purposes may substitute its opinion for that of the Director (s. 47(2)).
A party to the proceeding may appeal the Tribunal's decision or order to the Divisional Court on a question of law (s. 47(10)).


Pesticides Act
Purpose
"The protection of environmental quality, human health, animal life, plant life and property from the improper use of pesticides."
Reason for Hearing
Tribunal's Role
Appeal
A person named in a control order issued by the Director may require a hearing by the Tribunal (s. 13(2)).
When the Director proposes to refuse to issue or renew, or to suspend or revoke, a licence to perform an extermination, a licence to operate an extermination business, a licence to sell pesticides, or other types of pesticides licences, the permit holder may require a hearing by the Tribunal (s. 13(2)).
Where the Director confirms a Provincial Officer's Order regarding a contravention, or where there has been a deemed confirmation, the person so ordered may require a hearing by the Tribunal (s. 26.5(1)).
Where the Director or a provincial officer is of the opinion, on reasonable and probable grounds, that an emergency exists, the Director or provincial officer may make an oral or written stop order to the person responsible. The recipient of a stop order issued by a Director or a stop order issued by a provincial officer that has been varied or confirmed upon appeal to the Director may require a hearing by the Tribunal (s. 27(7)).
The Tribunal may by order direct the Director to carry out the proposal and to take such action as the Tribunal considers the Director ought to take, and for such purposes the Tribunal may substitute its opinion for that of the Director (s. 13(4)).
The Tribunal may by order confirm, alter or revoke the order of the Director and for such purpose the Tribunal may substitute its own opinion for that of the Director (s. 26.5(8)).
The Tribunal may by order confirm, alter, or rescind the order of the Director and for such purposes that the Tribunal may substitute its opinion for that of the Director (s. 27(8)).
A party to a proceeding may appeal from the Tribunal's decision to the Divisional Court on a question of law and on any other question to the Minister of the Environment (s. 15(1) and (4)).


Safe Drinking Water Act, 2002
Purpose
"To recognize that the people of Ontario are entitled to expect their drinking water to be safe. To provide for the protection of human health and the prevention of drinking water health hazards through the control and regulation of drinking water systems and drinking water testing."
Reason for Hearing
Tribunal's Role
Appeal
Each of the following decisions of a Director under this Act is a reviewable decision (s. 127(1)):
• A refusal to issue or amend a permit, licence, or approval.
• A refusal to grant a consent for the fragmentation of a non-municipal drinking-water system.
• A decision to impose, vary, or remove conditions on a permit, licence, or approval.
• A refusal to impose a condition in a permit, licence, or approval.
• A decision to suspend a licence or approval, other than a suspension of a drinking-water testing licence ordered by the Minister under section 108.
• A decision to revoke a permit, licence, or approval.
• A refusal to extend the expiry date of a drinking water licence under subsection 44(6) or 73(5).
• A refusal to renew a licence or approval.
• A refusal to consent to the transfer of a licence.
• A decision to issue an order.
• A decision to confirm, amend, or revoke an order made by a Director or a provincial officer.
NOTE: A refusal by a Director or provincial officer to issue, amend, or revoke an order is not a reviewable decision (s. 127(3)).
The Tribunal may confirm, vary, or revoke the decision of the Director. The Tribunal may direct the Director to take such action as the Tribunal considers necessary for the purposes of this Act. The Tribunal may substitute its opinion for that of the Director (s. 132(1)).
A party to a hearing before the Tribunal may appeal to the Divisional Court on a question of law from the decision or order of the Tribunal in accordance with the rules of the Court (s. 134(1)).
A party to a hearing before the Tribunal may make a written appeal to the Minister from the Tribunal's decision on any matter other than a question of law within 30 days from the receipt of the notice of the Tribunal's decision, or within 30 days after the disposition of an appeal to the Divisional Court. The Minister may, if he or she deems it necessary for the purposes of this Act, confirm, vary, or revoke the Tribunal's decision (s. 135(1) and 135(2)).
The following is also a reviewable decision (s. 127(1)):
• A decision to issue a notice of administrative penalty under s. 121.
The Tribunal may confirm or revoke the decision of the Director or vary the decision, but not so as to vary the amount of the penalty unless the Tribunal considers the amount to be unreasonable (s. 132 (4)).
There is no appeal of Tribunal decisions on administrative penalties.
The following is also a reviewable decision (s. 127(1)):
• A decision to issue an order to pay costs under s. 122.
The Tribunal may only confirm, vary, or revoke the decision (s. 133(2)).
The Tribunal may only consider:
• whether the cost relates to something done in connection with a notice of emergency response or appointment of interim operating authority
• whether the cost is reasonable, having regard to the nature of that thing (s. 133(4)).
There is no appeal of Tribunal decisions on cost orders.

Appendix B

Profile of Tribunal Members

Chair

Toby Vigod *(appointment expires May 31, 2009)*

- Appointed as Chair in June 2005
- Appointed as a Vice-Chair in December 2004
- Manager, Federal/Provincial/Territorial Relations and Co-Manager, National Secretariat, Climate Change Secretariat, Ottawa (2000-2004)
- Chair, Environmental Appeal Board and Forest Appeals Commission, British Columbia (1996-2000)
- Assistant Deputy Minister, Department of Policy, Planning and Legislation, Ministry of Environment, Lands and Parks, British Columbia (1994-1996)
- Commissioner, Commission on Planning and Development Reform in Ontario (1991-1993)
- Sessional Lecturer, Queen's University, Faculty of Law (1985-1991, 1993); University of Toronto, Faculty of Law (1991 and 1992); Osgoode Hall Law School (1993); Queen's School of Public Administration (1990 and 1991); Department of Geography, Ryerson University (2005)
- Counsel (1980-1993) and Executive Director (1986-1993), Canadian Environmental Law Association
- Called to the Ontario Bar (1980)
- B.A. (History Specialist) University of Toronto (1973) and LL.B Queen's University (1977)
- Member of a number of federal and Ontario environmental law reform committees; written extensively in the areas of environmental law and policy

Vice-Chairs

Jerry V. DeMarco *(appointment expires June 26, 2013)*

- Appointed as a Vice-Chair in June 2005
- Master of Science (Toronto); Master of Management (McGill); Master in Environmental Studies (York); Bachelor of Laws (Toronto); Bachelor of Arts (Windsor)
- Registered Professional Planner (R.P.P./MCIP) (1996)
- Called to the Ontario Bar (1996)
- Staff Lawyer (1996-2000) and Managing Lawyer (2000-2004), Sierra Legal Defence Fund, Ontario Office
- Articling Student (1994-1995), Ministry of Environment and Energy
- Publications have appeared in a wide variety of periodicals, journals and books
- Recipient of City of Toronto's first Green Toronto Award for environmental leadership

Knox M. Henry *(appointment expired March 14, 2009)*

- Acting Chair (December 2004-May 2005)
- Appointed as a Vice-Chair in 1991
- Member, Environmental Appeal Board (1978-1991)
- Member, Pesticides Appeal Board (1975-1978)
- Cross-appointed as member of the Ontario Rental Housing Tribunal (1999-2003)
- Cross-appointed as a Deputy Mining and Lands Commissioner (1995-1997)
- Strong background as one of Canada's leading horticulturalists
- Guest lecturer on propagation, management and environmental issues at various universities and colleges

Paul Muldoon *(appointment expires April 3, 2014)*

- Appointed as a Vice-Chair in April 2006
- Staff Lawyer (1994-1998) and Executive Director (1998-2006), Canadian Environmental Law Association
- Masters of Laws (LL.M), McGill (1984); Masters of Arts (M.A.), McMaster (1983), Bachelor of Laws (LL.B.) Ottawa, 1981, Bachelor of Arts (B.A.) Wilfrid Laurier, 1978
- Called to the Ontario Bar (1984)
- Member, Science Advisory Board, International Joint Commission (1990-1995)
- Member, Environmental Bill of Rights Task Force (1992-1994)
- Author or Co-author of a number of books and dozens of published articles
- Lecturer on environmental law at the Centre for the Environment, University of Toronto and the Faculty of Environmental Studies, York University

Dirk VanderBent *(appointment expires September 17, 2011)*

- Appointed as a Vice-Chair in September 2006
- Senior Manager, Judicial Support, Office of the Chief Justice, Ontario Court of Justice (2000 to 2006)
- Representative for the Attorney General, during the Walkerton water contamination crisis (2000)
- Mediator/Arbitrator, Financial Services Commission of Ontario (1994 to 2000)
- Senior Counsel, Children's Aid Society of Hamilton-Wentworth (1991 to 1994)
- Barrister & Solicitor in private practice, (1982 to 1991)
- Called to the Ontario Bar 1982
- Certificate in Advanced Mediation Skills, Ryerson Polytechnical Institute (1990)
- B. Math University of Waterloo (1975), LL.B. Osgoode Hall Law School (1980)

Robert V. Wright *(appointment expires August 26, 2009)*

- Appointed as a Vice-Chair in August 2007
- Senior Counsel (2000-2007) and Managing Lawyer (2005-2007), Sierra Legal Defence Fund, Toronto (now Ecojustice Canada)
- Sole Practitioner, civil litigation and commercial law, Toronto (1998-2000)

- Fellow of LEAD Canada, International sustainable development program under the auspices of the National Roundtable on the Environment and the Economy and the International Development Research Centre, Ottawa, Thailand and Zimbabwe (1994-1996)
- Litigation Counsel and Partner, Owens, Wright; Toronto (1984-1998)
- Solicitor, Durrant, Piesse; London, England (1984)
- Solicitor's Final Examination, The Law Society of England and Wales, London, England (1984)
- Master of Laws (LL.M.), University of Cambridge, Sidney Sussex College, Cambridge, England (1984)
- Commercial litigation Associate, Borden & Elliot (now Borden, Ladner, Gervais), Toronto (1981-1983)
- Litigation Associate, McMaster, Montgomery, Toronto (1980-1981)
- Called to the Ontario Bar (1980)
- Articling student, Giffen, Pensa (now Pensa & Associates), London, Ontario (1978-1979)
- Bachelor of Laws (LL.B.), University of Western Ontario (1978)
- Bachelor of Arts (B.A.), University of Toronto (1975)

Part-time Members

Heather Gibbs *(appointment expires June 30, 2009)*

- Appointed as a Member July 1, 2007
- Appointed as a Vice-Chair September 20, 2006
- Appointed as a Member of the Immigration and Refugee Board from November 1998 to September 2006, where she was member of the Professional Development Committee and nominated to conduct training for decision-makers in Mexico
- Legal Officer with the United Nations High Commissioner for Refugees (1994 to 1998), as a local Officer in Canada as well as a Regional Legal Officer in Rwanda and Central African Republic
- Called to the Ontario Bar (1992) and subsequently practiced administrative law (human rights, labour and immigration law)
- Graduate of University of Ottawa (L.L.B. 1990) and University of Western Ontario (B.A. 1986)

Alan D. Levy *(appointment expires May 8, 2012)*

- Appointed as a Member May 9, 2007
- Mediator & lawyer in private practice (commencing 1972)
- Roster mediator, Ontario Mandatory Mediation Program, Superior Court of Justice (since 1999)
- Director of Environmental Law Practicum, adjunct member of Faculty of Law, University of Toronto (since 2000)
- Executive member, Advisory Panel of Minister of Environment (Ontario) on improving environmental assessment process (2004-2005)

- Vice-Chair (part-time), Workplace Safety and Insurance Appeals Tribunal (2004-2007)
- Mediator, Canadian Environmental Assessment Agency, Ontario Region (2002-2003)
- Vice-Chair, Environmental Assessment Board, Ontario (1990-1998)
- Member, Environmental Appeal Board, Ontario (1991-1998)
- A founder, Canadian Environmental Law Association (1970)

Bruce Pardy *(appointment expires June 21, 2013)*

- Appointed as a Member in June 2005
- Associate Professor, Faculty of Law, Queen's University (2000 -)
- Associate Dean, Faculty of Law, Queen's University (2002-04)
- Visiting Professor, South Texas School of Law International Program, Malta (2000); California Western School of Law, San Diego (1998-2000); Seattle University School of Law (1996)
- Visiting Scholar, University of British Columbia Faculty of Law (1997)
- Senior Lecturer (Associate Professor) (1996-99) and Lecturer (Assistant Professor) (1993-96), Faculty of Law, Victoria University of Wellington, New Zealand
- Sessional Lecturer, Faculty of Law, University of Western Ontario (1992)
- Lawyer, Litigation Associate (1990-93) and Articling Student (1988-89), Borden Ladner Gervais LLP, Barristers & Solicitors
- Called to the Ontario Bar (1990)
- LL.B. University of Western Ontario (1988); LL.M. Dalhousie University (1991)
- Written extensively on environmental law and policy in Canada, U.S. and New Zealand

Dayna Nadine Scott *(appointment expired May 8, 2009)*

- Appointed as a Member May 9, 2007
- Assistant Professor, Osgoode Hall Law School and the Faculty of Environmental Studies, York University (2006-)
- Legal Research Fellow, McGill Center for International Sustainable Development Law, Montreal; Sessional Lecturer, McGill Faculty of Law (2005-2006)
- Fulbright Scholar, NYU School of Law (2004-2005)
- Called to the Ontario Bar (2002)
- Law Clerk, Federal Court of Canada (2001-2002)
- B.Sc. (Hons.) (Guelph); LL.B. (Osgoode); MES (York); Ph.D. (Osgoode)
- Publishes in the area of environmental law and regulation

Marcia Valiante *(appointment expires May 8, 2012)*

- Appointed as a Member May 9, 2007
- Professor of Law, University of Windsor (since 1992)
- Teaches Canadian Environmental Law, International Environmental Law, Planning Law, Property Law
- B.A., B.Sc. University of New Hampshire, LL.B. Osgoode Hall Law School, LL.M. Queen's University
- Called to the Bar of Ontario, 1986

- Member, International Joint Commission Great Lakes Science Advisory Board
- Author of works on Canadian environmental law and policy, planning law, water law and Great Lakes governance

Joyce M. Young *(appointment expired April 10, 2009)*

- Appointed as a member in April 2006
- Mediator for over 20 years
- Trained Circle facilitator
- Teaches in the Advanced Dispute Resolution Certificate Program at York University
- Director of the Alternative Dispute Resolution Institute of Ontario
- Mediated a number of Environmental Assessments for both private and public proponents
- Negotiated one of the first Community Compensation Agreements between a private waste management company and a Public Liaison Committee of local residents and stakeholders

Appendix C

Learning Programs		
Date	**Topic**	**Presenters/Visitors**
April 25, 2008	Climate Change Law & Policy in the Post-Kyoto Era	Bruce Pardy, Part-time Member, Environmental Review Tribunal Fatima Abdulrasul, Air Policy and Climate Change Branch, MOE John Turchin, Legal Services Branch, MOE
	The Ipperwash Inquiry, The Process	Derry Millar, Counsel, Weir Foulds
	Pesticides Regulation Update	Lorna Poff, Co-Manager, Pesticides Management Section, MOE
June 6, 2008	**Highlighting Changes in Waste Processing**	
	Waste Diversion Initiatives	John Armiento, Industrial Medical Waste Unit, Waste Management Policy Branch, MOE
	Tour of Miller Waste Facility	Scott Wolfe, Vice President and General Manager, Facilities, Miller Waste Systems
	Tour of Earl Turcott Waste Management Facility, York Region	Rodney Libby, Manager
	Tour of Miller Outdoor Compost Facility	Scott Miller, Manager
	Tour of Miller Waste Indoor Compost Facility	Brad Harper, Manager Anthony Dillard, Manager
September 19, 2008	Toxics Reduction Initiative	Mary Anne Covelli, Acting Director, Strategic Policy Branch, MOE Nancy Hartry, Legal Services Branch, MOE
	Lake Simcoe Initiative	Chris Lompart, Policy Manager, MOE Jamie Flagal, Legal Services Branch, MOE

	Spill Cost Recovery	Garth Napier, Assistant Director, Program Services Section, West Central Region, MOE Kris Crawford-Dickinson, Legal Services Branch, MOE
December 5, 2008	Pesticides Regulation Update	Robert Bilyea, Senior Policy Advisor, Strategic Policy Branch, MOE
	Clean Water Act - Update	Paul Heeney, Manager, Source Protection Implementation, MOE
	Mining Act Initiative	Susan Capling, Director, Mining Act Modernization Secretariat, MNDM
February 27, 2009	**Aboriginal Issues and the ERT**	
	Duty to Consult and other Emerging Issues	Shin Imai, Associate Professor, Osgoode Hall Law School
	Duty to Consult and Provincial Initiatives	Grant Wedge, Director, Legal Services, Ministry of Aboriginal Affairs
	Duty to Consult: Issues on the Ground	Chief Randall Kahgee, Chief of Saugeen First Nation
	Update on Financial Assurance	Zeljko Romic and Mary Ouroumis, Environmental Assessment Support Unit, MOE

Appendix D

Key Performance Goals For Next Fiscal Year 2009-2010

For more information on the Tribunal's performance goals refer to the Business Plan for 2009-2012.

1. Core Function: Conducting Pre-Hearings, Hearings and Decision Making

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #1: Tribunal Members will treat all participants in a hearing with courtesy and respect.	The Tribunal will send Questionnaires to hearing participants at the completion of the hearing and review the Questionnaires received to monitor performance regarding respect and courtesy. All complaints received will be investigated in accordance with the Tribunal's Complaints Policy.	To continue to send Questionnaires to hearing participants in order to monitor performance regarding respect and courtesy by Tribunal Members. To investigate complaints in accordance with the Tribunal's Complaints Policy.	Results of the Questionnaires received will be reported in the Tribunal's Annual Report. All complaints will be investigated and the Tribunal will comply with its Complaints Policy.
Commitment #2: Tribunal Members will render timely decisions.	The Tribunal will track the time it takes a Member to render written decisions.	Decisions will be rendered within 60 days of final arguments, except for those hearings with legislated timelines and hearings under the *Consolidated Hearings Act*. Where matters have been terminated due to a settlement agreement, Tribunal Members will render these decisions within 10 days from the receipt of the settlement agreement.	In 80% of all hearings held, Tribunal Members will adhere to the applicable target.

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #3: Tribunal Members will be trained.	All Members will receive adequate training to conduct hearings, and write decisions. Vice-Chairs will receive training to conduct mediation sessions.	Members will be trained in the conduct of hearings, knowledge of legislation, Tribunal's Rules, decision writing and alternative dispute resolution.	New Members will be trained to conduct hearings independently within three months of their appointment. All Members will receive ongoing training regarding the Tribunal's legislation, Rules of Practice and administrative policies. The Tribunal will continue to conduct its Learning Programs which include Member Training. These Programs are designed to provide information on new legislation, environmental, planning and administrative law issues.
Commitment #4: Offer pre-hearing conferences in appeals and plan amendments under the *NEPDA*. Schedule preliminary hearings in all other appeals and applications, prior to the commencement of the hearing.	When all parties agree to participate, pre-hearing conferences for matters under the *NEPDA* will be held. For all other appeals and applications, preliminary hearings will be held, at least 30 days prior to the commencement of the hearing.	To increase the number of pre-hearing conferences.	Continue to offer pre-hearing conferences in every matter under the *NEPDA* and preliminary hearings in all other appeals and applications. The Tribunal will monitor the success of pre-hearing conferences and preliminary hearings by tracking the cases that are resolved prior to the hearing.

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #5: Report on requests for review, costs, appeals and judicial review of Tribunal Decisions.	The Tribunal will report the outcome of any requests for review, costs or appeals of its decisions or judicial review applications.	Review and analyze the outcome of any requests for review, or appeal of its decisions or judicial review applications.	The Tribunal will summarize any decision on a request for review, costs, appeal or judicial review in its Annual Report. The Tribunal will review its practices in light of any court decisions.

2. Core Function: Processing of Hearings

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #6: Continue to schedule hearings within the timeliness standard.	Hearings will be scheduled within the timeliness standard.	Hearing dates will be scheduled within 30 calendar days from the filing date of the application/appeal and within 7 calendar days from the date the Tribunal receives all required information/ documentation from the parties.	In 90% of all cases, staff will adhere to the target of scheduling cases within 7 calendar days of receiving required information/ documentation. The target may not be met in cases where parties have requested that a matter not be scheduled due to settlement discussions.

3. Core Function: Conducting Mediation

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #7: Offer Mediation services in all appeal cases, where appropriate. Upon request provide mediation services in application cases, after a preliminary hearing is held and prior to the commencement of the hearing.	When all parties agree to participate, mediation sessions will generally be held following the preliminary hearing, and generally 30 days prior to the commencement of the hearing.	To increase the number of mediation sessions.	Continue to offer mediation services in every appeal and at the request of the parties in applications. Questionnaires will be sent to all parties at the completion of the mediation session to ascertain their level of satisfaction with the process and assist the Tribunal in improving its services. The Tribunal will monitor the success of mediation sessions by tracking the cases that are resolved prior to the hearing.

4. Core Function: Providing Public Access

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
Commitment #8: The Tribunal will use its website to provide information and communicate with the public.	The Tribunal will continue to review its website to update the content, improve user access and to track the number of visitors to the site.	To continue to increase the use and efficiency of the website.	The information contained on the website will be re-viewed and improvements made to ensure ease of use for the public. The Tribunal will continue to update its website within 24 hours regarding hearing

Goals/Outcomes	Measures	Targets/Standards	2009-2010 Commitments
			related information Amendments to the Rules of Practice and Practice Direct-ions the release of the Business Plan and Annual Report will be posted as approved.
Commitment #9: Rules, Guides and Tribunal Policies will be updated.	The Tribunal will review its Rules, Guides and Tribunal Policies in order to update the information to ensure accuracy and consistency.	To continue to update information on the hearing process.	To review and revise the Rules, Guides and Tribunal Policies as needed or when changes to the governing legis-lation, regulations and government policies arise.

Appendix E

Financial Report
2008-2009

General Account for the Operation of the Tribunal:

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$1,063,300	$1,063,300	$1,155,200
Transportation and Communications	97,500	97,500	33,570
Services	174,100	174,100	380,461
Supplies and Equipment	97,500	97,500	44,025
Total	$1,432,400	$1,432,400	$1,613,256

Additional Funds Allocated:

Clean Water

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Transportation and Communications	$ 0	$ 0	$ 0
Services	$ 396,400	$ 396,400	$ 0
Supplies and Equipment	$ 0	$ 0	$
Total	$ 396,400	$ 396,400	$ 0

Nutrient Management Act

Standard Account	Printed Estimates	Approved Budget	Actual Expenditures
Salaries & Wages[1]	$ 42,800	$ 42,800	$ 0
Transportation and Communications	$ 4,300	$ 4,300	$ 0
Services	$ 60,400	$ 60,400	$ 0
Supplies and Equipment	$ 4,300	$ 4,300	$ 0
Total	$ 111,800	$ 111,800	$ 0

[1] Employee benefits are being managed centrally.

Appendix F

Contact Information

For further information about this report or the Environmental Review Tribunal contact:

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